Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION and THE DETROIT EDISON COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Detroit Edison Company ("DECo") provides retail electric service in Michigan subject to the ratemaking jurisdiction of the Michigan Public Service Commission ("MPSC"). DECo is a party to a "Standard Contract" with the Department of Energy ("DOE") for the disposal of spent nuclear fuel ("SNF"). The Standard Contract resulted from enactment of the Nuclear Waste Policy Act of 1982 ("NWPA"). Both the NWPA and the Standard Contract required the utility to pay SNF fees to the DOE in exchange for DOE's unconditional obligation to dispose of SNF beginning January 31, 1998. *Indiana Michigan Power Company v. Department of Energy*, 88 F.3d 1272 (C.A. D.C., 1996). ("*Indiana Michigan*"); *Northern States Power Company et al v. DOE*, 128 F.3d 754 (1997) ("*Northern States*") The DOE has not begun SNF disposal and is in default of the Standard Contract.

On June 20, 2003, DECo filed a consolidated case with the MPSC seeking approval of new base electric rates and also Power Supply Cost Recovery ("PSCR") rate factors for the year 2004. DECo included its SNF fee costs under the Standard Contract in its PSCR rate request, but provided little support for inclusion of the fee costs in rates in light of the contract breach.

Petitioner Michigan Environmental Council ("MEC" or "Petitioner") presented extensive expert testimony in opposition to inclusion of the SNF contract fees in rates, absent conditions to protect the fees.

DECo asserted that MPSC ratemaking authority was subject to federal preemption. The hearing officer adopted DECo's preemption argument. The MPSC, in turn, adopted the hearing officer's ruling. The Michigan Court of Appeals upheld the MPSC preemption order based upon "collateral estoppel", citing the Court's contemporaneous decision in *In re Application of Indiana Michigan Power Company*, 738 N.W.2d 289 (2007) (pending review in this Court's Docket 08-246). Against this background, the question presented are:

I. Whether federal law preempts the Michigan Public Service Commission from exercising its historic police powers to protect the public interest and to regulate electric utility retail rates by adopting ratemaking remedies with respect to a utility's continued payment of SNF fees under the Standard Contract that is in long-term default?

PARTIES TO THE PROCEEDINGS

The following were the parties to the proceedings before the Michigan Court of Appeals:

1. Michigan Environmental Council ("MEC")

2. Public Interest Research Group in Michigan ("PIRGIM")

3. Michigan Public Service Commission ("MPSC")

4. The Detroit Edison Company ("DECo"), which is a subsidiary of DTE Energy.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner MEC states that it has no parent corporations, no publicly held companies owning 10% or more of its stock, and no non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The Michigan Environmental Council ("MEC") respectfully petitions the Court for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The relevant portions of the Michigan Court of Appeals' Opinion (Petitioner's Appendix, 1a-16a) is reported at 276 Mich. App. 216; 740 N.W.2d 685 (2007).[1] The relevant portions of the MPSC opinion and order in Case No. U-13808, dated November 28, 2004 is attached (27a-37a). The MPSC's June 30, 2005, order denying Petitioners' Motion for Rehearing is attached (17a-26a).[2]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

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[1] The complete copy of this decision, including irrelevant portions, is included in the Appendix of a companion docket before this Court, *MEC vs. MPSC and Indiana Michigan Power*, Docket 08-246 (234a-280a).

[2] The Michigan Supreme Court's September 19, 2008 order denying Petitioner's Application for Leave to Appeal is attached (45a-51a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the following constitutional and statutory (and federal contract) provisions:

The Supremacy Clause of the United States Constitution, Article VI, clause 2 provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."

The Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* ("NWPA"), relevant provisions (52a-76a), and the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste ("Standard Contract"), 10 C.F.R. 961.11 *et seq.* (77a-117a).

Michigan's ratemaking statutes include Sections 6 and 6a of 1939 P.A. 3, M.C.L. 460.6 and 6a, as amended by 1982 P.A. 304, M.C.L. 460.6j *et seq.*, including Sections 6j, 6k, 6l, 6m, M.C.L. 460.6j-6m, and Section 6a as amended by 2008 P.A. 286 ("Act 304") (118a-158a), procedural provisions of the Michigan Administrative Procedures Act, 1969 P.A. 306 ("APA"), including Sections 1, 3, 71-87, M.C.L. 24.201, 203, 271-287, (159a-174a).

STATEMENT

This petition seeks review of important issues of federal law that are integrally related to those presented to this Court in a companion case, docketed

as *Michigan Environmental Council v. Michigan Public Service Commission and Indiana Michigan Power Company*, No. 08-246. As a result of peculiar events below, however, this case originated earlier than the above case, but now arrives before this Court on an urgent basis at this time.[3]

Petitioner presented substantial expert evidence and briefing before the MPSC in this case that DECo has not been reasonable and prudent in continuing to pay the SNF contract fees in the face of DOE's indefinite and continuing default, and recommending various ratemaking remedies to protect ratepayers. In response, DECo relied upon an argument of federal preemption – that its continued payment of the SNF contract fees are "mandated by federal law" and that the MPSC must therefore allow recovery of the fee costs in rates.

The MPSC below adopted the ruling of the Administrative Law Judge ("ALJ") in favor of federal preemption. Upon review, the Michigan Court of Appeals let this result stand, by improperly applying "collateral estoppel" to the issue, based upon its contemporaneous decision in *In re Application of Indiana Michigan Power Company*, 275 Mich. App. 369; 738 N.W.2d 289 (2007), before this Court in Docket 08-246.

The MPSC and lower Court decisions, through an improper application of preemption and

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[3] Petitioner respectfully requests that this case and Docket No. 08-246 be considered by this Court on a consolidated basis.

misunderstanding of federal precedent, have deprived ratepayers of administrative ratemaking remedies respecting costs incurred under the breached federal contract, and have dangerously circumscribed the MPSC's regulatory jurisdiction and authority to set just and reasonable rates and protect Michigan's retail ratepayers. Left undisturbed, the decisions below effectively undermine the ability of any state commission to exercise its regulatory authority respecting the purely economic aspects of the costs of nuclear energy production and of spent nuclear fuel costs. The decisions below ignore and conflict with this Court's ruling in *Pacific Gas and Electric Co v. Energy Resource Commission*, 461 U.S. 190 (1983), and ignore or misconstrue other federal precedent including *Indiana Michigan Power Company et al v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996), ("*Indiana Michigan*"); *Northern States Power Company et al v. DOE*, 128 F.3d 754 (1997), ("*Northern States*") among other cases. As such, the decisions present recurring questions of national importance that require resolution by this Court.

The MPSC and lower Court decision also ignored long-standing precedent in Michigan that: (i) the MPSC possesses the authority and duty to protect ratepayers from an uneconomic or failed contract entered into by a utility by using its ratemaking power to disallow costs of the contract in rates (not by directing utility decision-making); *Union Carbide v. Public Service Commission*, 431 Mich. 135; 428 N.W.2d 322 (1988), and (ii) the costs incurred by a utility pursuant to a federal statutory mandate does not necessarily govern the MPSC ratemaking determination concerning whether the costs should be

includable in rates; *City of Detroit v. PSC*, 308 Mich. 706; 14 N.W.2d 784 (1944).

1. The Department of Energy's default under the Standard Contract.

Congress adopted the NWPA in 1982 to address the disposal of SNF (52a-76a). The NWPA was preceded by decades of promises by the federal government that it would undertake responsibility to dispose of SNF, dating from the time of the Manhattan project and the 1950's "Atoms for Peace" program aimed at promoting the commercial generation of nuclear energy.

The NWPA included no provision indicating Congressional intent to affect, let alone preempt, state ratemaking authority over utilities providing retail electric service. The "Findings" and "Purposes" section of the NWPA, Section 111(a) and (b), 42 U.S.C. 10131 (60a-62a) states that the costs of SNF disposal "should be the responsibility of the generators and owners of . . . spent fuel" and that one of the purposes of the NWPA is:

> " (4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel."

Under Section 302(a)(1) and (2), 42 U.S.C. 10222(a)(1) and (2), the DOE Secretary is to enter into

contracts "with any person who generates or holds title to . . . spent nuclear fuel. . ." and for ". . . disposal of . . . spent fuel", and further, that the contracts should provide for the "payment to the Secretary of fees" for "electricity generated . . . and sold . . . equal to 1.0 mil per kilowatt hour" (85a). Section 302(a)(5), 42 U.S.C. 10222(a)(5) (66a), provides:

> "...(5) Contracts entered into under this section shall provide that—
>
> ...(B) in return for payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter."

In 1983, the DOE promulgated its uniform "Standard Contract" to carry out the NWPA (77a-117a). The Standard Contract (Art II – Scope) stated (90a):

> ". . . .The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactor . . . has been disposed of."

The Standard Contract (Article XI – Remedies) also preserved all contractual and legal remedies to enforce the Contract. ("Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law"). (108a).

Despite the statutory and contractual deadline for commencement of SNF disposal, the DOE on April 28, 1995, issued its *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995), absolving itself of any duty to dispose of SNF until it had access to a federal repository. In response, many utilities, states, and state utility regulatory agencies, appealed to the United States Court of Appeals (D.C. Circuit), which reversed and vacated DOE's "Final Interpretation" in *Indiana Michigan*. The Court held that there was a reciprocal obligation between payment of the SNF fee and DOE's performance of its SNF disposal duties:

> ". . . we hold that section 302(a)(5)(B) creates an obligation in DOE, reciprocal to the utilities' obligation to pay, to start disposing of the SNF no later than January 31, 1998."

Upon remand, the DOE did nothing to comply with the Court's directive. Because the 1998 deadline was fast approaching, the utility and state petitioners filed another case in the United States Court of Appeals seeking mandamus to require the DOE to comply with *Indiana Michigan*. In response, the Court issued its decision adopting a partial mandamus order in *Northern States* (128 F.3d at 761) reiterating its findings in *Indiana Michigan* . . . "that the NWPA imposes an unconditional obligation on the Department to begin disposal of the SNF by January 31, 1998." The *Northern States* Court found that a full mandamus was not yet called for on the basis that damage suits against DOE in the United States Court of Claims may provide a "potentially adequate

remedy". The *Northern States* Court did not foreclose other potential remedies that may be pursued later.

After *Northern States*, some nuclear utilities – including IMP – filed damage actions against DOE in the Court of Claims. However, while the Court of Claims can award damages for certain costs incurred by utilities arising from DOE's contract default, such awards neither result in SNF disposal nor performance under the Standard Contract, nor do they protect the SNF fees that continue to be paid. Further, while a utility's claimed damages represent costs generally paid by ratepayers in rates, the Court of Claims has no power to ensure that ratepayers receive refunds from damage awards.

DECo entered into the Standard Contract with the DOE for disposal of the SNF generated by DECo. DECo continues to pay the SNF fee, without any discernable protections or conditions, despite the more than ten-year default by DOE under the Standard Contract.

2. State retail ratemaking authority over SNF fee cost/rate issues.

The MPSC is granted the jurisdiction, authority, and duty to set retail rates for utilities pursuant to several statutes, including 1939 P.A. 3 ("Act 3") and Act 304, (139a-174a) among others. DECo is a nuclear utility serving retail electric customers in the State of Michigan.

General rate cases and Act 304 cases are classified as "contested cases", subject to prior notice and

hearing, under both the above MPSC statutes and the Michigan Administrative Procedures Act, 1969 P.A. 306, MCL 24.201 *et seq.* (159a-174a). The APA provides parties to agency proceedings extensive rights to formal discovery, presentation of witnesses, cross-examination, written briefs, issuance of a Proposal For Decision ("PFD") by the Administrative Law Judge ("ALJ"), and the right to file written exceptions thereto, and the issue of an agency order made "upon consideration of the record as a whole . . . and as supported by and in accordance with the competent, material, and substantial evidence". Art 6, Section 28, of Michigan's Constitution (175a) also places this latter requirement upon public agencies such as the MPSC.

Act 304 was adopted in 1982 to provide greatly enhanced scrutiny of utility fuel, purchased power, and related costs, on an annual basis. For electric utilities, these are called "power supply cost recovery" ("PSCR") cases.

Section 6a, M.C.L. 460.6a, (154a-158a), requires full evidentiary hearings in Act 304 and general rate cases. Section 6a requires a utility to "place in evidence facts relied upon to . . . increase its rates and charges" and "a reasonable opportunity for a full and complete hearing" (as defined, 157a).

Section 6a (157a) provides that the MPSC

> "shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent."

Section 6j(1)(a), M.C.L. 460.6j(1)(a), of Act 304 (123a), provides for PSCR clauses and rate factors:

> ". . . to allow the utility to recover . . . costs . . . incurred under reasonable and prudent policies and practices."

Section 6j(3) states that "a utility annually shall file . . . a complete" PSCR plan describing the expected sources and changes in the cost of electric power supply, all major contracts and power supply arrangements to include the price of fuel, duration of the contract or arrangement, and related information "as required by the Commission, and "an explanation of the actions taken by the utility to minimize the cost of fuel to the utility." (124a-125a). Section 6j(6), requires the MPSC to evaluate the reasonableness and prudence of the decisions underlying the utility's PSCR plan, and to "approve, disapprove, or amend" the plan, and to consider . . . whether the utility has taken all appropriate actions to minimize the cost of fuel". (126a-127a).

Act 304's review process includes specifically nuclear fuel costs, <u>including costs for SNF disposal</u>. Section 6j(1)(a) refers to "transportation costs, reclamation costs, and **disposal and reprocessing costs, of fuel burned by the utility for electric generation**." (123a). Section 6j(13)(g) and (j) mandates that the MPSC in a PSCR reconciliation shall "disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts" and to "disallow increases in charges for

nuclear fuel disposal unless the utility has received the prior approval of the commission". (132a).

The MPSC's jurisdiction to fully review SNF fee costs is clear under the plain language and purpose of Act 304.

The MPSC's ratemaking authority in this case is even broader, as this case was conducted as a consolidated base rate and Act 304 case, encompassing all of the MPSC's ratemaking authority.

3. The DECo case before the MPSC and Courts.

On June 20, 2003, DECo filed this consolidated general rate case and Act 304 PSCR case. DECo's case proposed the continued inclusion in rates of its SNF fee costs under its Standard Contract.

MEC/PIRGIM intervened and challenged through expert testimony DECo's proposal to flow-through in rates the cost of the SNF fees (without protective conditions), in view of the federal default of the Standard Contract.

Petitioner presented the testimony and exhibits of its expert witness, Ronald C. Callen, an expert in nuclear energy, SNF disposal, and state and federal utility regulation.[4] Witness Callen testified (256-257a)

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[4] Mr. Callen has 15 years experience as a physicist in the nuclear industry followed by 25 years on the staff of the MPSC, two (2) years as the first director of NARUC's (National Association of Regulatory Utility Commissioners) nuclear waste office in

that DECo's case filing was incomplete and insufficient because it failed to provide any explanation or detail to justify the recovery of spent nuclear fuel (SNF) fees; and that DECo's request to include the SNF fee costs in rates should be disallowed because it failed to demonstrate it has been reasonable and prudent in incurring, mitigating, or minimizing SNF costs. Witness Callen also detailed the substantial costs and risks of SNF storage and disposal that are presently placed totally upon the ratepayers, with utilities sharing little or none of these costs and risks.

Witness Callen (257a-258a) detailed the SNF costs and risks facing ratepayers:

> There are basically four types of costs that DECo may incur for SNF storage and disposal: (1) through the federally assessed fee for disposal, currently one mill per kilowatt hour; (2) the cost of developing additional storage – both in storage pools and using dry storage casks; (3) for increased plant decommissioning costs due to the formerly unanticipated presence of SNF or increased SNF quantities on site at the end of operational life; and (4) the cost of SNF disposal in the event the federal government never fulfills its obligations.

Washington, DC and eight (8) years as a consultant and witness in cases involving nuclear power and SNF matters. Witness Callen's testimony and exhibits in this case (MPSC Case U-13808) is incorporated in Petitioner's appendix at 243a-295a, including his Exhibits I-78, I-79, and I-80 (278a-295a).

Witness Callen (258a, Exhibit I-79, 288a) stated that DECo had collected from ratepayers $93.9 to $95.8 million in SNF contract fees through the third quarter of 2003, and would collect $7.9 in fees in the year 2004. Further substantial costs and risks relate to SNF storage expansion, ultimate SNF storage site decommissioning, and with respect to ultimate SNF disposal of federal SNF disposal failures became permanent (258a-261a).

Petitioner witness Callen (263a) testified that DECo's testimony and exhibits were devoid of any explanation concerning its handling of SNF issues and costs, and that there was no support for any finding that DECo has been reasonable and prudent with respect to said matters so as to support the recovery of the SNF costs.

The witness (263a-265a) testified that the SNF fee costs:

> . . . should be disallowed on the basis that DECo has not demonstrated it has been reasonable and prudent with respect to their incurrence and to undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protection of the accounts represented by said costs.

The witness cited DECo's failure to fully enforce its Standard Contract, or to protect the ongoing SNF fees given the federal default, and the need for protective terms and conditions, such as an escrow. The witness (265a-266a) noted DECo's failure to provide any

explanation for its failure to undertake further actions, and DECo's refusal to answer discovery on the issue.

Petitioner witness Callen recommended that DECo's rate request should be reduced by the amount of SNF fees ($7.9 million) included in rates for 2004 (266a). The witness noted that DECo should also pursue its added SNF storage costs caused by the federal contract breach from the federal government (266a-267a). The witness stated (267a-268a) that while DECo can continue to pay the SNF fee contract costs, the MPSC should protect ratepayers from SNF costs and risks resulting from the contract default. The witness (268a-269a) stated that DECo, as the owner and generator of SNF, should also share in the cost and financial risk resulting from DECo's generation of SNF, and that

> . . . ratepayers are at risk at paying multiple times for SNF fees, and storage or disposal costs, for a federal SNF disposal program that is in default.
>
> and . . . that DECo, by its actions and inactions, or omissions, has not undertaken adequate action on a sustained basis to ensure DOE's performance of its contract, ...

Witness Callen provided additional reasons for a rate disallowance for SNF costs (269a-270a):

> By failing to adequately enforce its Standard Contract, by failing to undertake self-help remedies or court action to establish a utility escrow for SNF fee payments on and after

January 31, 1998, DECo has essentially renegotiated its Standard Contract with the federal government to allow SNF fee payments to continue while DOE performance does not. In its filing, DECo presents no justification for concluding that the law or sensible regulatory policies require the SNF fee to be paid indefinitely, while DOE performance is deferred indefinitely, contrary to the holding of the courts that the fee and federal performance were absolutely reciprocal.

Witness Callen (270a-277a, Exhibit I-80, 289a-295a) presented in detail a number of "collect but protect" remedies the MPSC could adopt to protect ratepayers, other than a rate disallowance, including but not limited to further investigation, implementation of a "ratepayer" escrow, among other remedies, and the justification for such remedies.

In contrast to Petitioner's extensive expert testimony, DECo presented relatively sparse testimony requesting continued recovery of the SNF contract fee costs in rates, despite the ongoing contract breach. DECo's presentation focused primarily upon a mathematical calculation of the amount of SNF fee costs included in its rate request.

In post hearing briefing before the MPSC, DECo asserted prominently that the MPSC is required to allow DECo to recover its SNF fee costs in rates as a

matter of federal preemption, on the basis that federal law mandates DECo to pay the contract fees.[5]

In contrast, Petitioner's initial brief, dated May 14, 2004, (pp 10-49) extensively covered the SNF fee cost and rate issues, and also established (pp 49-64) that MPSC ratemaking authority with respect to the SNF fee cost and rate issues was not preempted by federal law.[6]

The ALJ in this case (38a-44a) summarized DECo's arguments and affirmatively found that preemption applied (39a-40a):

> . . . Detroit Edison continues that federal preemption requires the Commission to allow Detroit Edison the ability to recover all SNF fees and costs.
>
> * * *
>
> . . . the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena.

Petitioner filed exceptions to the ALJ's ruling.[7] DECo's reply to exceptions, dated October 7, 2004, pp

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[5] DECo's initial brief in this case (MPSC Case No. U-13808), dated May 14, 2004, pp 143-149.

[6] Petitioner's reply brief, dated May 28, 2004, pp 6-18, also fully responded to DECo's briefing arguments on these issues.

[7] Petitioner's exceptions dated September 16, 2004, pp 14-79.

74-95, claimed in prominent part (pp 79-90) that the MPSC is required by federal preemption to allow DECo to recover in rates its ongoing SNF fee costs, despite the contract default.

The MPSC then issued its final order in U-13808, dated November 23, 2004 (relevant portions, 27a-37a). The MPSC order's 5-sentence ruling on SNF issues (33a) adopted the ALJ's preemption ruling:

> . . . The Commission finds that the ALJ cannot be faulted for his recommendation.

On December 22, 2004, Petitioner filed a petition for rehearing of the MPSC's order. On January 12, 2005, DECo filed its answer opposing Petitioner's rehearing petition, again asserting federal preemption of MPSC ratemaking authority.

The MPSC's subsequent June 30, 2005 Order denying rehearing (17a-26a) reiterated the MPSC's adoption of the ALJ's preemption ruling. The MPSC order noted Petitioner MEC's insistence ". . .that the Commission is not preempted by federal law from disallowing recovery of these fees" (21a), and DECo's argument "that because federal law requires it to pay these SNF charges and fees, the Commission is preempted from preventing Detroit Edison from recovering these costs in its rate." . . . (22a). The MPSC rehearing order concluded unequivocally (24a):

> As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. the Commission is

not persuaded that it should reach a different conclusion at this time.

Upon Petitioner's appeal of the MPSC order in *DECo* to the Michigan Court of Appeals, Petitioner and DECo extensively briefed the SNF fee and preemption issues. The Court issued its July 3, 2007 decision *In re Application of Detroit Edison*, 276 Mich. App. 216, 740 N.W.2d 685 (2007) (1a-16a) holding that:

> "We note at the outset of our analysis of MEC's and PIRGIM's appeal that these same plaintiffs challenged the PSC's identical determination regarding spent nuclear fuel (SNF) issues in *In re Application of Indiana Michigan Power Co*, 275 Mich App 369; 738 NW2d 289 (2007). In *Indiana*, we rejected each and every legal challenge MEC and PIRGIM raise here. Therefore, for the reasons and on the grounds set forth in our decision in *Indiana* and under the doctrine of collateral estoppel, we reject all of plaintiff's arguments regarding the SNF-related issues and hold that the PSC properly rejected all of MEC/PIRGIM's SNF-related challenges."

The DECo court thus ignored the evidentiary record and the MPSC's preemption ruling, and the extensive briefing on the preemption issue, and rejected review on the merits by means of a *sua sponte* application of collateral estoppel, based upon its decision *In re Application of Indiana Michigan Power Company*, 275 Mich. App. 369, 738 N.W.2d 289 (2007).

The lower court decisions in this case and the *IM Power* case were authored by the same judge. Yet the Court ignored the obvious immutable inconsistency in stating in *IM Power* (192a) that the Court "need not consider this argument because the PSC did not reply on the doctrine of federal preemption" and the opposite situation in this *DECo* case, wherein the MPSC adopted preemption as a basis for its decision![8]

The Michigan Supreme Court thereafter issued its September 19, 2008 order refusing review of Petitioner's SNF fee cost and rate issues. (45a-51a).

4. IM Power case before the MPSC and Michigan Court of Appeals

The related *IM Power* case referenced earlier is fully discussed in Petitioner's August 25, 2008 Petition for Certiorari, and Petitioner's October 17, 2008, Reply Brief, filed in this Court's Docket No. 08-246.

5. MPSC and Court cases involving CECo.

Petitioners also intervened in the 2004 PSCR case filed by another Michigan nuclear utility, Consumers Energy Company ("CECo"). Petitioner in evidence and briefing challenged CECo's inclusion in rates of CECo's SNF contract fees, based upon similar grounds as presented in *IM Power* and *DECo*.

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[8] The *DECo* appeal was filed and argued before that Court earlier than *IM Power*; nevertheless, the lower court issued its decision in *DECo* after the decision in *IM Power*.

Petitioner appealed the MPSC order denying relief in CECo. Upon review, the Michigan Court of Appeals issued its April 1, 2008 unpublished decision (196a-207a) affirming the MPSC order based upon the Court's decisions in *IM Power* and *DECo*. Petitioner's subsequent application for leave to appeal to the Michigan Supreme Court was denied by that Court's order dated September 19, 2008 (203a-204a).

In a subsequent case involving CECo's 2006 PSCR Plan case, the Michigan Court of Appeals has now affirmed the striking of all of Petitioner's evidence in CECo's rate case, thus foreclosing any evidentiary challenge to CECo's SNF costs in rates. In *Michigan Environmental Council et al v. Consumers Energy Company et al*, published decision in docket 274471, _____ Mich. App. _____, ____ N.W.2d _____ (October 21, 2008), 2008 Mich. App. LEXIS 2032, the Court held:

> C Spent Nuclear Fuel
>
> Appellants have repeatedly sought to make an issue of how utilities manage the problem of spent nuclear fuel. This Court has published a decision declaring that the PSC properly refused to entertain appellants' advocacy in this regard. *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 376-380; 738 NW2d 289 (2007). Citing the latter case, this Court more recently disposed of such arguments without elaboration. *In re Application of Detroit Edison Co*, 276 Mich App 216, 240-241; 740 NW2d 685 (2007). In light of caselaw establishing that the PSC is not obliged to

entertain appellants' proposals concerning spend nuclear fuel, the decision in this instance to strike the related evidence is unassailable.

The result is that, based upon *IM Power* and *DECo*, the only evidence permissible in MPSC rate cases is utility sponsored evidence in support of inclusion of SNF contract fee in rates, without protective conditions, and despite the federal contract breach. Opposing evidence on this issue by intervenors is barred outright.

REASONS FOR GRANTING THE WRIT

The lower Court improperly affirmed the MPSC's circumscribed view of its own ratemaking authority respecting the economic regulation of nuclear power in a decision based on mistaken interpretations of federal statutes and decisions (*Indiana Michigan*, *Northern Power*, and *Pacific Gas and Electric, supra).*

The erroneous decision has far-reaching consequences: it impacts millions of citizens and billions of dollars of ratepayer derived funds; it has already been applied to other Michigan cases – including the *CECo* case described above, and may infect regulatory commission and Court decisions in other states by undermining the explicit holding by federal courts that the SNF fee payments are reciprocal to DOE's obligation to dispose SNF.

1. The MPSC and Michigan Court of Appeals' decisions are contrary to decisions of this Court, the federal Court of Appeals, and lower federal courts.

The MPSC and Court decisions in *IM Power* and this *DECo* case have erroneously found that federal preemption of state ratemaking authority applies to bar any review or remedies applicable to SNF costs. The decisions below do so by ignoring this Court's decision in *Pacific Gas & Electric v. Energy Resource Commission*, 461 U.S. 190 (1983) by misconstruing the U.S. Court of Appeals' holdings in *Indiana Michigan* and *Northern States Power*, by misapplying the NWPA and Standard Contract, and by ignoring this Court's standards for determining federal preemption.

This Court in *Pacific Gas* held that state regulation with respect to the economic aspects of nuclear power, or to address the **economic** or **environmental** effects of nuclear generation and nuclear waste, are not preempted by federal law, including the NWPA and the Atomic Energy Act establishing NRC regulation. Thus, federal law does not foreclose state remedial or protective actions to protect ratepayers.

No dispute existed here that the SNF fee cost issues were squarely placed before the MPSC as a matter of state (not federal) retail electric regulation. Thus, the MPSC had the primary regulatory jurisdiction under state statutes to review this issue, in a manner fully consistent with Congress'

demarcation in the regulation of utilities between the federal and state governments.[9]

The lower Courts have also misconstrued the NWPA. The fee mandate in 42 U.S.C. 10222 is tied to the requirement in 42 U.S.C. 10222 that the DOE Secretary enter into the Standard Contract. In other words, the statutory fee is required by the NWPA to be included in the contract, and is then tied to the reciprocal obligation of payment of fees in exchange for commencement of SNF disposal by January 31, 1998 (42 U.S.C. 10222(a)(5); *Indiana Michigan Power*). The statutory fee "mandate" is not a stand-alone requirement, but must be interpreted within the overall contractual context established in 42 U.S.C. 10222.

Several federal courts have held that the DOE's obligation to dispose of spent nuclear fuel is only contractual. *Yankee Atomic Electric Co v. United States*, 42 Fed. Cl. 223 (1998); *Consumers Energy Co v. United States*, 57 Fed. Cl. 278 (2003); *Commonwealth Edison Co v. United States*, 56 Fed. Cl. 652 (2003). If the NWPA obligated the utilities to enter into the contracts (and to pay the fee in exchange for commencement of SNF disposal by DOE by 1998) then the SNF fees are contractual in nature. This means that utilities are not limited to damage actions before

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[9] Congress in Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b), expressly preserved state ratemaking and other regulation over retail electric sales. *Connecticut Light & Power Co v. FPC*, 324 U.S. 515 (1945); New York v. Federal Energy Regulatory Comm., 535 U.S. 1 (2002); *Detroit Edison v. FERC*, 334 F.3d 48 (2003).

the U.S. Court of Claims, but may exercise additional contractual remedies *preserved* by the Standard Contract (Article XI-Remedies, 108a), which could include a Court action to escrow the fees, to sue for restitution or specific performance, or to consider complementary self-help remedies.[10]

The lower Court in *IM Power* also ignored the unequivocal ruling of the U.S. Court of Appeals in *Indiana Michigan Power* respecting the reciprocal nature of the SNF fee payment to DOE's performance under the Standard Contract. Instead, the Michigan court misconstrues the federal court's holding, and eviscerates its clear-cut holding. It engages in a linguistic sleight of hand when it moves from a sentence mischaracterizing Petitioners' argument to the assertion that payment of the NSF fees is mandated by statute: "*Indiana Michigan* does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility. . . The payment of SNF fees . . . is mandated by 42 USC 10222."

Neither the NWPA nor the Standard Contract provided for indefinite payment of the fees in exchange for indefinite non-performance of SNF disposal, as countenanced by the lower Court and MPSC. The NWPA and Standard Contract requires the utility to

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[10] In *Maine Yankee Atomic Power Co v. United States*, 225 F.3d 13436 (CA Fed 2000), the Court found that the administrative remedies provided for in the contract were inadequate and not applicable to the DOE's more significant breach. *See also Northern States Power Co v. United States*, 224 F.3d 1361 (CA Fed 2000).

pay the SNF fee at least until January 31, 1998,[11] but is silent as to ratemaking.

Of course, even if the SNF fee were a separate stand-alone federal statutory mandate applicable to the utility, this does not mean that the MPSC as a state regulatory agency must *ipso facto* include the costs of the fee in retail rates. Accord, *City of Detroit v. PSC*, 308 Mich. 706; 14 N.W.2d 784 (1944). Many costs may arise from federal mandates, but that does not necessarily translate into reasonable and prudent expenses to be recovered in rates. The existence of a "federal mandate" by itself does not control the MPSC's independent ratemaking power to make an appropriate rate adjustment, or to fully scrutinize the facts including the utility's actions and non-actions, and to adopt conditions and remedies to protect ratepayers.

The Michigan courts have also ignored the U.S. Court of Appeals' 1997 decision in *Northern States Power* that reinforced the court's ruling in *Indiana Michigan* and reiterated the conditional nature of DOE's contract obligation in exchange for the SNF fees being collected under the contract. The Court in *Northern States Power* did not foreclose other remedies, besides pursuing past damages in the U.S. Court of Claims, to either enforce the Standard Contract, or protect the fees paid thereunder, on a

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[11] Since DOE has defaulted in its reciprocal obligation, (i.e., payment of fees in exchange for DOE performance by January 31, 1998) there is no basis to simply assume that, on and after 1998, the utility SNF fee obligation continues indefinitely (without protective remedies).

going forward basis. The Standard Contract also does not limit the remedies that a party to the contract can pursue to protect the fees being paid in the face of a default by the DOE.

The lower Court in *IM Power* also misapplied the "federal filed rate doctrine" to this case, by citing the statutory fee and *ABATE v. Public Service Commission*, 192 Mich. App. 19, 22-27; 480 N.W.2d 589 (1991). The federal filed doctrine simply is not applicable.[12] Unlike the *ABATE* case, the subject SNF fee costs are not subject to FERC regulation but are reviewed under state retail regulation.

Contrary to the lower Court's decision in *IM Power*, the U.S. District Court in *Roedler et al v. Dept of Energy et al*, 1999 U.S. Dist Lexis 21613, (unpublished, 196a-234a), affirmed, *Roedler et al v. DOE et al*, 255 F.3d 1347 (2001), in a case where retail ratepayers sought refunds of SNF fees due to the contract default, held that, if any filed rate doctrine existed, it was with respect to the rates set by the Minnesota Public Utilities Commission ("MPUC"), which regulated the utility's retail rates. The same is true here.

The lower Court and MPSC decisions in *IM Power* also improperly rested their result upon the

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[12] The federal filed rate doctrine arose in cases such as *Mississippi Power and Light Company v. Moore*, 487 U.S. 354, 372-376 (1988) and *Nantahala Power and Light Co v. Thornburg*, 476 U.S. 953 (1986), where state ratemaking agencies sought to make their own cost and rate allocation determinations, different from those set by the Federal Energy Regulatory Commission ("FERC"), with respect to the rates of multi-state utilities regulated by the FERC.

unexplained claim that IMP would risk losing its license to operate its nuclear power plant if IMP refused to pay the SNF fees.[13] In the present contract default context, it is untenable to suggest that the NRC or DOE could place itself in a superior position under the Standard Contract by penalizing or retaliating against a license holder for undertaking action to better enforce its contract or to protect the fees being paid under the failed contract.

The decisions below also fail to explain a basis for finding preemption under this Court's traditional preemption tests. This Court stated in *Schneidewind v. ANR Pipeline Co*, 485 U.S. 3293, 299-300 (1988):

> ". . . A pre-emption question requires an examination of congressional intent. . . . Congress explicitly may define the extent to which its enactments pre-empt state law."

The decisions below cite no language in the NWPA or Atomic Energy Act (or the Standard Contract or NRC regulation) to establish any Congressional intent to preempt state ratemaking jurisdiction over retail electric utilities, or to review nuclear power or SNF costs.

Congress must be deemed to know how to preempt states' authority when it intends to do so. The plain

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[13] A problem with this ground for affirming the MPSC decision is that IMP's non-lawyer witness' scant testimony that non-payment of the fees would risk a loss of IMP's nuclear license is unexplained, a malady that continued in IMP's briefs, the MPSC order, and lower Court decision.

language of the NWPA indicates no Congressional intent to preempt otherwise applicable state ratemaking authority over SNF costs. This conclusion is confirmed by the U.S. Court of Appeals, in *Roedler, supra*, wherein the Court exhaustively reviewed the NWPA, the Standard Contract, and DOE regulations, and found that the NWPA required SNF fee and other costs to be paid by the "owners and generators" of SNF, and included no specific reference or obligation involving ratepayers (e.g. see NWPA Section 111, 42 U.S.C. § 10131, 83a-85a).

The Atomic Energy Act ("AEA"), 42 U.S.C. 2011 *et seq.*, and NRC regulations also do not preempt state ratemaking authority on this issue. The NRC and state commissions operate in separate spheres of subject matter jurisdiction – the NRC on safety issues, with the state commissions overseeing retail rates.

This federal/state regulatory division is reflected in NRC regulations that recognize state commission regulation of costs, rate collections, and trust oversight, related to the decommissioning of nuclear plants.[14] Recent amendments of NRC regulations expressly recognize state regulatory requirements to establish additional assurances and funding mechanisms, over and above those required by the NRC, to assure decommissioning and ultimate SNF disposal.[15] The NRC's 2002 rulemaking expressly

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[14] NRC regulations, including 10 C.F.R. § 50.75 and 10 C.F.R. 72.30.

[15] Rules and Regulations, Nuclear Regulatory Commission, 10 C.F.R. Parts 50 and 72, RIN 3150-AG 52, Decommissioning Trust

stated that the NRC intends no preemption of state regulation, and in fact endorses state action to ensure funds or security for decommissioning (including extending it to SNF sites.) NRC's regulations concerning the preparation of management and financial plans to decommission SNF sites, and to manage SNF until it is transferred to the DOE for disposal,[16] also do not create preemption issues.

The MPSC and lower Court decisions below also do not explain a basis for preemption under the concepts of "field" or "conflict" preemption (e.g. *Silkwood v. Kerr-McGee Corp*, 464 U.S. 238, 248 (1984)). As noted, Congress did not intend or provide for "field" preemption here, and state ratemaking authority is not ousted (e.g. *Pacific Gas & Electric*, NWPA, *Roedler*).

Similarly, no "conflict" preemption applies. The MPSC could have accepted all of Petitioners' remedies without creating any actual conflict or impossibility of compliance by IMP with both MPSC remedies and federal law. Indeed, MPSC's consideration and adoption of one or more of Petitioners' remedies would have promoted Congress' objectives and purposes because it would energize the utility to do more to enforce the Standard Contract and ensure the safe disposal of SNF in accordance with the NWPA and Atomic Energy Act, while also protecting ratepayers.

Provisions, 67 FR 78332 *et seq.*, 67 FR 78339-78344; December 24, 2002.

[16] 10 C.F.R. § 72.30(a) and (b), and 20 C.F.R. 50.54 (bb).

There is no merit to the lower court's or MPSC's remarks in *IM Power* that Petitioners' remedies were "extraordinary" or beyond the scope of Act 304.[17] What is extraordinary is not Petitioners' ratemaking remedies, but rather the lack of adequate utility enforcement of its SNF contract, and the utility's continued payment of SNF fees without protection or condition in the face of DOE's long-term contractual default. Additionally, the remedies cannot be viewed as "extraordinary" given that the MPSC has in the past undertaken just such alternative remedies, without legal impediment, including rate investigations, establishment of an MPSC regulated trust for nuclear plant decommissioning and SNF fees for pre-1983 nuclear generation, rate or performance bonds as a pre-condition to rate increases, among other remedies. Michigan courts also have affirmed MPSC decisions on rate disallowances ordered under Act 304.[18]

The MPSC and Michigan lower court decisions that state regulation must or should ignore the default in the Standard Contract, and DOE's non-performance, and to refuse any ratemaking remedies to protect the ratepayers with respect to the fee payments, merely based upon the holding that the "fee is mandated by

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[17] The ALJ in the generic complaint case, MPSC Case No. U-13771, exhaustively reviewed Petitioners' remedies and found that the MPSC has the authority to adopt all of them. (See Petitioners' appendix in Docket 08-246, 533a-560a).

[18] In *Consumers Power v. MPSC*, 196 Mich. App. 687; 493 N.W.2d 424 (1992), the court affirmed an Act 304 disallowance to protect ratepayers from an uneconomic fuel contract.

statute" and "by the Standard Contract" is unwarranted and erroneous. Neither the NWPA or the Standard Contract envisioned indefinite payment of fees by utilities (without conditions or protections) in exchange for indefinite (or permanent) non-performance by the DOE.

Ratepayers in Michigan have now been foreclosed from challenging SNF fee cost/rate issues – not through the required factual and legal findings based upon the evidentiary record and briefing arguments – but rather upon the overwhelming but mistaken perception of the MPSC (and lower Courts) that MPSC review and the rendering of rate remedies relative to the SNF fee costs are preempted by federal law. The Michigan Courts have now also sought to foreclose review and ratemaking remedies on a permanent basis – by applying the decision in this case to bar the issue from rate cases based upon "collateral estoppel".

2. The predominance of the preemption issue is highlighted by the lower Court's erroneous application of collateral estoppel.

The lower Court (15a-16a) inherently affirmed a finding of preemption in this case by the simple, but erroneous, expedient of applying collateral estoppel to the issue in this case based upon the Court's contemporaneous decision in *IM Power* (180a-195a). The lower Court did so despite the prominent litigation of the preemption issue by Petitioner and DECo before the agency and the lower Court, and the agency ruling in favor of preemption.

The lower Court also applied collateral estoppel on a *sua sponte* basis, despite the fact that no party to this Court raised any issue of collateral estoppel. The lower Court's holding contravened established Michigan precedent that collateral estoppel does not apply to MPSC ratemaking cases. *Consumers Energy v. MPSC*, 707 N.W.2d 633 (2005).

The lower Court fails to explain how it could avoid review of the constitutional preemption issue presented to it when Michigan precedent holds that agencies such as the MPSC are not to decide constitutional issues, and the Courts are to review and decide statutory and constitutional questions on a *de novo* basis. *Universal Am-Can v. MPSC*, 494 N.W.2d 787 (1992); *City of Taylor v. The Detroit Edison Co.*, 715 N.W.2d 28 (2006). The *DECo* Court's application of collateral estoppel in this fashion also disregarded the procedures set forth in the Michigan Court Rules, M.C.R. 7.215(J) (176a-179a) for departing from this established binding precedent. In contradictory fashion, the Court in *IM Power* also stated it did not rule on preemption because the MPSC did not, while the Court in *DECo*, has acquiesced in the agency's finding in favor of preemption.

Even aside from all of the above maladies affecting the lower Court's ruling, traditional tests for collateral estoppel should have alerted the Court that the doctrine did not apply here. The Court in *Jewish War Veterans v. Gates*, 506 F.Supp 2d 30, 39 (U.S.D.C. – DC, 2007), stated the test for collateral estoppel as follows:

> The D.C. Circuit has articulated a three-step test to decide whether collateral estoppel bars further litigation of an issue: 1) the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case; 2) the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case; and 3) preclusion in the second case must not work a basic unfairness to the party bound by the first determination. (cites omitted).

Applying the above tests, how could the lower court in this case find (15a-16a) that collateral estoppel applied to the preemption issue based upon the *IM Power* case, when the Court's decision in *IM Power* (authored by the same judge) professed (192a) that the Court was not deciding the preemption issue? How could the Court apply collateral estoppel when it would work a basic unfairness to the Petitioner?[19] What fairness exists to Petitioner and others when the lower Court's decision in *DECo* and *IM Power* are now being applied before the MPSC and Michigan Courts to now foreclose even the receipt of any evidence by Petitioner

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[19] Petitioner in *IM Power*, certiorari petition in docket 08-246 dated August 25, 2008, and reply brief dated October 17, 2008, explained that discovery and a fair hearing process on the SNF fee cost and rate issues in *IM Power* was foreclosed. The Court in *Tipler v. E.I. DuPont de Nemours & C.*, 443 F.2d 125, 128 (6th Cir. 1971) stated: ("Neither collateral estoppel nor res judicata is rigidly applied. Both rules are qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice.")

on the SNF fee cost and issues in subsequent ratemaking proceedings (as explained supra, pp 19-21)? How could the *IM Power* case foreclose the preemption issue when this case (the *DECo* case) in reality predated the *IM Power* case before the MPSC and lower court? How could collateral estoppel be applied by the lower Court in this *DECo* case, based upon *IM Power*, when both of the decisions were not yet final in that both decisions were appealed by Petitioner and now are both pending consideration by this Court? How can collateral estoppel now be applied to foreclose any future review on the merits of ratemaking matters involving the continued inclusion by a utility in rates of contract fees under a contract in apparent long-term or permanent default?

Petitioner asserts that the overriding importance of the preemption issue is transparent, and the lower Court's situational maneuvers on this issue should not be countenanced. The Court should exercise its supervisory powers in this instance, and resolve this important federal constitutional issue.

3. This case involves issues of significant national importance.

The preemption issue presented is of national significance and importance.

Congress adopted the NWPA to "at last" resolve the important question of SNF disposal, after decades of unclear strategies and unrealized promises by federal agencies concerning how and when this nation would dispose SNF. The NWPA committed the federal government to disposing SNF on a reliable basis by

requiring a contract that included the reciprocal obligation of fee payments to fund a disposal program in exchange for actual performance by a date certain.

The years since passage of the NWPA in 1982, and the signing of contracts in 1983, and thereafter, have yielded disappointing results. The contract has not been honored by DOE. The "firm" deadline for performance was first ignored and then voided by DOE's inaction. The only aspect of the contract to be performed on time has been the payment of SNF fees, funded by ratepayers through rates or charges.

The nation's ratepayers have paid nearly 30 billion dollars to fund contributions to the Nuclear Waste Fund for post-April 1983 nuclear generation, and in one-time fees for pre-1983 nuclear generation. (296a) Meanwhile, the promised date for commencement of SNF disposal shifts repeatedly forward and becomes ever more distant. Besides the SNF fees, the nation's ratepayers increasingly pay for duplicative costs incurred by nuclear utilities due to the default in the Standard Contract (i.e. payment of SNF fees plus incurring higher costs due to the default).

The DOE has been in default of its SNF disposal contract for nearly 11 years, and there is no credible estimate as to when, if ever, DOE contract performance will occur. A single state, presently selected by Congress for a potential SNF repository, has clogged agency and court processes with numerous lawsuits challenging SNF disposal. Yet the ratepayers in the 35 states where SNF is piling up in aging plants or in outside SNF "storage sites" have not had their interests adequately represented, and the temporary

SNF storage sites were never intended nor designed to be long-term or permanent.

State regulatory commissions and their staffs in some instances have investigated the SNF fee/cost rate issues and the default in the Standard Contract, but are frequently met with the argument that state regulatory authority is preempted. At the same time, utilities have less incentive to fully pursue legal remedies to enforce the Contract and protect the SNF fees so long as they can comfortably pass-on all such fee costs in customer rates. This Court's ruling that state regulatory commissions may in fact review SNF fee cost/rate issues pursuant to their rate jurisdiction over utilities would provide an enhanced incentive for utilities to undertake greater action and ratepayer interests would be better protected.

Utility damage actions in the U.S. Court of Claims, while they may return some past incremental costs to utilities caused by DOE's default, do <u>not</u> accomplish some important objectives: to actually accomplish SNF disposal, to protect the ongoing fee payments under the breached contract, to ensure refunds to ratepayers of damage awards received (to recognize these were for costs included in rates), to ameliorate duplicative costs being paid by ratepayers, or to engender some modicum of future compliance under the Contract.

The major lingering preemption issue should be faced and resolved so our nation's institutions and ratepayers may definitely know how and where to proceed. The issue should be resolved to stop the continued erosion of the NWPA's objectives and

purposes, to enforce the Standard Contract, and to prevent the disregard and evisceration of this Court's holdings in *Pacific Gas*, and the ruling of the federal courts in *Indiana Michigan*, *Northern States*, and other cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: October 29, 2008

APPENDIX

APPENDIX A

COURT OF APPEALS OF MICHIGAN

Docket Nos. 259845, 264099, 264131, 264156, 264191

[Filed July 3, 2007]

In re Application of Detroit Edison Company; Attorney General,
Appellant,

v.

Michigan Public Service Commission, Detroit Edison Co., and Constellation Newenergy, Inc.,
Appellees.

In re Application of Detroit Edison Company; Detroit Edison Company,
Appellant,

v.

Michigan Public Service Commission, Association of Businesses Advocating Tariff Equity, Michigan Environmental Council, Public Interest Research Group in Michigan, Constellation Newenergy, Inc., and

Attorney General,
Appellees.

In re Application of Detroit Edison Company;
Michigan Environmental Council and
Public Interest Research Group,
Appellants,

v.

Michigan Public Service Commission, Detroit
Edison Co., and Constellation Newenergy, Inc.,
Appellees.

In re Application of Detroit Edison Company;
Association of Businesses Advocating
Tariff Equity,
Appellant,

v.

Michigan Public Service Commission,
Detroit Edison Co., Energy Michigan, Inc.,
Constellation Newenergy, Inc., and
Attorney General,
Appellees.

In re Application of Detroit Edison Company;
Attorney General,
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Michigan Public Service Commission,
Detroit Edison Co., Energy Michigan, Inc.,

Constellation Newenergy, Inc., and Association of Businesses Advocating Tariff Equity,
Appellees.

Submitted Feb. 21, 2007, at Lansing.
Decided July 3, 2007, at 9:10 a.m.

The Detroit Edison Company filed an application in the Public Service Commission to increase its electricity rake and reinstate its power supply cost recovery (PSCR) plan, as well as for approval of a regulatory asset recovery surcharge, implementation of a mitigation adjustment mechanism, approval of an earnings sharing mechanism, termination of its securitization and transition charges for choice customers, and authorization to use excess securitization savings to recover its stranded costs. The PSC issued an interim order that required Edison to reinstate its PSCR clause, then granted in part and denied in part Edison's request for relief. The PSC also ruled that Edison had the authority to charge its customers to subsidize the costs of its renewable energy program. After granting in part Edison's petition for rehearing, the PSC reaffirmed the bulk of its holdings, and Edison, the Attorney General, the Michigan Environmental Council (MEC) and the Public Interest Research Group In Michigan (PIRGIM), and the Association of Businesses Advocating Tariff Equity (ABATE) separately appealed various aspects of the PSC's rulings. The Court of Appeals consolidated the appeals.

The Court of Appeals *held:*

1. The PSC's order authorizing Edison to impose new surcharges on residential customers during a period in which the Legislature had capped rates at a reduced level was not unlawful or unreasonable because the surcharges were offset by decreases in other rates, which resulted in no overall rate increase.

2. The PSC's decision to allow Edison to recover transmission costs is within the PSC's broad ratemaking authority and consistent with the governing statutory language, previous PSC decisions, and applicable caselaw.

3. The PSC's order requiring Edison's customers to provide funding for the low-income and energy-efficiency fund (LIEEF) that will not be used in Edison's service territory is not unlawful because the statutory language that created the LIEEF referred to it in the singular and did not limit the use of a utility's funds to that utility's own service territory.

4. The PSC lacked the statutory authority to empower Edison to impose an additional monthly charge on all its customers whose rates were not capped in order to subsidize the cost of Edison's voluntary renewable energy program.

5. The PSC's decision not to reduce Edison's short-term debt or increase its working capital so that Edison's base rate would equal its liabilities was not unlawful or unreasonable. The PSC was entitled to use a six-month rather than a 12-month average to calculate Edison's short-term debt, and was also

entitled to rely on the evidence provided by its staff despite the existence of contradictory evidence.

6. Edison is entitled to recover its share of the control premium its parent company paid to acquire another energy company, despite the fact that the company was in financial distress, because the merger resulted in cost savings. Because allowing Edison to amortize its recovery of the control premium over a 40-year period is too speculative, Edison must substantiate its savings in its next rate case.

7. Edison did not show by clear and convincing evidence that the PSC's decision not to adjust the test year for an additional year of inflation when using data from the year 2002 that were adjusted for inflation for 2003 and 2004, when the PSC did not release its final order until November 2004, was unlawful or unreasonable; the PSC has the discretion to allow a test year not to coincide precisely with the year that rates are implemented.

8. The issues related to spent nuclear fuel raised by MEC and PIRGIM were already raised and decided by this Court in a previous case; therefore, these claims are barred under the doctrine of collateral estoppel.

9. The PSC acted within its broad ratemaking authority in adopting a transitional power supply rate tariff that applied only to customers with whom Edison had entered into special manufacturing contracts in light of the rate shock that those customers would experience if subjected to regular tariff rates and the possibility that they would leave Edison's service entirely as a result. Contrary to

ABATE's assertion, the PSC's decision on this issue was based on sufficient evidence in the record.

10. The PSC correctly concluded that it should treat Edison's request for establishment of a PSCR base and factors as having been brought under MCL 460.6j(3) through (7), despite the fact that Edison's application cited MCL 460.6j(18), because the PSC had determined that Edison's PSCR clause was automatically reinstated and Edison filed a separate PSCR plan case for 2005.

Affirmed in part and reversed in part.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Susan I. Leffler* and *Donald E. Erickson*, Assistant Attorneys General, for the Attorney General.

Dykema Gossett P.L.L.C. (by *Albert Ernst, Stewart A. Binke,* and *Christine Mason Soneral*), Lansing, for the Public Service Commission.

Bruce R. Maters, Jon P. Christinidis, Richard P. Middleton, and *Michael J. Solo, Jr.*, and *Foster, Swift, Collins & Smith, P.C.* (by *William K. Fahey* and *Stephen J. Rhodes*), Detroit, Lansing, for the Detroit Edison Company.

Clark Hill P.L.C. (by *Don L. Keskey*), Lansing, for the Michigan Environmental Council and the Public Interest Research Group in Michigan.

Clark Hill P.L.C. (by *Robert A.W. Strong* and *Thomas E. Maier*), Lansing, for the Association of Businesses Advocating Tariff Equity.

Before: MARKEY, P.J., and SAAD and WILDER, JJ.

SAAD, J.

I. INTRODUCTION

On June 20, 2003, the Detroit Edison Company (Edison) filed its application for an increase in its rate schedules that govern the distribution and supply of electric energy. The hearings before the Public Service Commission (PSC) were extensive.[1] And, as the PSC noted, the proceedings before it were "among the most complex cases ever considered by the Commission."[2] Indeed, as the PSC opined in its November 23, 2004, opinion and order, this case "affects not only the operations of the utility, but also the finances of over two million of its residential and business customers in ways that no proceeding brought before this agency has ever done."[3]

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[1] The PSC noted that the documents contained in the docket of this case encompass nearly 13,000 pages of testimony, exhibits, comments, and pleadings. See *In re Application of Detroit Edison Co.*, opinion and order of the Public Service Commission, issued November 23, 2004, 2004 WL 2672285, (Case No. U-13808) (November 23, 2004, order), p. 4 n. 4.

[2] *In re Application of Detroit Edison Co.*, order of the Public Service Commission, issued November 4, 2003, 2003 WL 22512003 (Case No. U-13808), p. 8.

[3] November 23, 2004,order, *supra* at 1.

Many of the issues decided by the PSC in this rate case have not been appealed by any party,[4] but

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[4] As part of this rate case, the PSC: (1) concluded that use of the staff's proposed 2004 test year, which was based on the historical 2002 year adjusted for inflation and other measurable changes, was reasonable and appropriate because that year was based on known and measurable facts, whereas Edison's proposed 2004 test year, which was fully projected and based on proposed operating plans, budgets, and capital acquisitions, was based on assumptions as well as proposals that had not been approved by management; (2) accepted the staff's recommended base rate of $7,123,560,000 for Edison, finding that that rate was reasonable because it was based on the 2002 historical test year adjusted for various known factors; (3) accepted the staff's proposed capital structure of 54 percent debt and 46 percent equity; (4) rejected Edison's request that it be allowed to recover $61.6 million of the control premium paid to acquire MCN Energy; (5) found that Edison's operation and maintenance (O & M) expenses should be reduced by $45,359,000 and rejected Edison's assertion that because of the age of its generation fleet, its O & M expenses would outstrip inflation in the coming years; (6) rejected Edison's assertion that the 2002 historical figures, adjusted for inflation for 2003 and 2004, should be adjusted for an additional year of inflation; (7) rejected Edison's request to recover $9.4 million in costs incurred during 2000 and 2001 to divest transmission assets, an action taken as a step toward complying with MCL 460.10w(1), and instead adopted the staff's position that the costs, which were incurred when Edison transferred transmission assets to an affiliate in preparation for sale of those assets to a third party, should be treated as an offset to the sale price in determining the premium realized from the sale; (8) adopted the staff's proposed transitional power supply rate (TPSR) tariff to be applied to contracts into which Edison entered with certain large manufacturing customers, but rejected the argument that all large manufacturing customers should be allowed to take service under the TPSR tariff; (9) affirmed that rate caps permitted netting rate reduction against rate increases to achieve rate adjustments, as long as the overall rate paid by customers did not increase; (10) emphasized that it had not rejected Edison's

those issues appealed by Edison, the Attorney General, the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM), and the Association of Businesses Advocating Tariff Equity (ABATE), were fully explored at a special three-hour hearing before this Court on February 21, 2007, wherein all parties presented their respective positions.

In Docket Nos. 259845, 264099, 264131, and 265156, the Attorney General of Michigan (AG), Edison, MEC/PIRGIM, and ABATE appeal the PSC's November 23, 2004, order regarding Edison's application for a rate increase. In Docket No. 264191, the AG appeals from the PSC's order of June 30, 2005, granting in part and denying in part Edison's petition for rehearing. These appeals have been consolidated for purposes of hearing and decision. We affirm in part and reverse in part.

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application to establish a PSCR factor under MCL 460.6j(18); (11) determined that all PSCR issues not addressed in the order could be raised in the 2004 PSCR reconciliation filing; (12) approved the inclusion of $39,858,000 in O & M costs to fund the low-income and energy efficiency fund (LIEEF), but rejected Edison's and the AG's assertion that the funds should be used only to serve low-income customers in its service territory; (13) found that the hearing referee correctly concluded that issues regarding spent nuclear fuel (SNF) should not be considered in the instant proceeding because related issues had been addressed in other proceedings; (14) found that the PSC had statutory authority under MCL 460.10b(1) and (6) to require Edison to establish a renewable energy program (REP) and concluded that Edison should do so; and (15) found that Edison should raise revenue to cover any shortfall in the amounts received under the REP by implementing a five-cent per meter, per billing cycle surcharge on all customers whose rates are no longer capped.

II. FACTS AND UNDERLYING PROCEEDINGS

The Michigan Legislature enacted 2000 PA 141, the Customer Choice and Electricity Reliability Act (Act 141), MCL 460.10 *et seq.*, as part of its decision to restructure and deregulate the electric utility industry in Michigan. *Attorney General v. Pub. Service Comm.*, 249 Mich.App. 424, 426, 642 N.W.2d 691 (2002). Among other things, Act 141 reduced rates and imposed caps on the rates that an electric utility could charge its customers. MCL 460.10d provides in pertinent part:

> (1) Except as otherwise provided under subsection (3) or unless otherwise reduced by the commission ... the commission shall establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000[5] that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000. Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on June 5, 2000 and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003.

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[5] Edison is such a utility.

(2) On and after December 31, 2003, rates for an electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 shall not be increased until the earlier of December 31, 2013 or until the commission determines, after notice and hearing, that the utility meets the market test under [MCL 460.10f] and has completed the transmission expansion provided for in the plan required under [MCL 460.10v]. The rates for commercial or manufacturing customers of an electric utility with 1,000,000 or more retail customers with annual peak demands of less than 15 kilowatts shall not be increased before January 1, 2005. There shall be no cost shifting from customers with capped rates to customers without capped rates as a result of this section. In no event shall residential rates be increased before January 1, 2006 above the rates established under subsection (1).

Edison's rates had not been comprehensively reviewed and set by the PSC since 1994, before Act 141 was enacted. Because of an expressed need to increase its rates and in anticipation of the expiration of the Act 141 caps, on June 20, 2003, Edison filed an application for a general rate case to increase its rates[6] and to

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[6] A "general rate case" is "a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service." MCL 460.6a(2)(b).

implement a power supply cost recovery (PSCR)[7] plan and five-year forecast. MCL 460.6j(18) permits an electric utility to conduct a PSCR proceeding in the context of a general rate case. Edison sought an increase in its rates on both an interim and a permanent basis, approval of a regulatory asset recovery surcharge, reinstatement of its PSCR clause, a determination of its stranded costs,[8] implementation of a mitigation adjustment mechanism, approval of an earnings-sharing mechanism, termination of its securitization and transition charges for choice customers, and authorization to use excess securitization savings to recover stranded costs.

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[7] A utility is entitled to recover the reasonable costs incurred in generating electricity. A "PSCR clause" is "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). The PSC "may incorporate a [PSCR] clause in the electric rates or rate schedule of a utility, but is not required to do so." MCL 460.6j(2).

[8] The PSC has defined "stranded costs" as costs incurred during an era of regulation that are above market prices and costs associated with the transition to competitive markets. Stranded costs include: "(1) regulatory assets, consisting of unrecovered costs of demand-side management programs and other similar costs, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retraining costs, and (5) costs related to the implementation of restructuring." *Consumers Energy Co. v. Pub. Service Comm.*, 268 Mich.App. 171, 181, 707 N.W.2d 633 (2005).

The PSC entered interim orders on December 18, 2003, and February 20, 2004, that required Edison to reinstate its PSCR clause as of January 1, 2004,[9] and granted Edison interim relief in the amount of $248,430,000, respectively.

On November 23, 2004, the PSC granted in part and denied in part Edison's request for relief.[10] In an order entered on June 30, 2005, the PSC granted Edison's petition for rehearing in part and denied it in part.[11] The PSC reaffirmed its holdings regarding Edison's capital structure, rate base, and capitalization; denied Edison's request to include the control premium paid in the acquisition of MCN in Edison's rates; and reaffirmed its holdings regarding the adjustment for inflation of the base rate and the availability of the low-income and energy efficiency fund (LIEEF) for customers throughout the state. More specifically, regarding Edison's assertion that the PSC rejected its PSCR proposal pursuant to MCL 460.6j(18), the PSC concluded that it should treat Edison's request for PSCR reinstatement and establishment of a PSCR base as having been raised

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[9] In *Detroit Edison Co. v. Pub. Service Comm.*, unpublished opinion per curiam of the Court of Appeals, issued October 4, 2005 (Docket No. 252966), another panel of this Court affirmed the PSC's decision.

[10] The hearing referee conducted extensive hearings in April 2004. Those hearings generated 3,329 pages of transcript and 235 exhibits.

[11] Other parties also sought rehearing of the PSC's November 23, 2004, order.

under MCL 460.6j(3) through (7), which provide for the filing of annual PSCR plan and reconciliation cases.

III. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co. v. Pub. Service Comm.*, 389 Mich. 624, 635-636, 209 N.W.2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich. 396, 427, 596 N.W.2d 164 (1999). And, of course, an order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc. v. Pub. Service Comm.*, 377 Mich. 259, 279, 140 N.W.2d 515 (1966). In sum, a final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record. Const. 1963, art. 6, § 28; *Attorney General v. Pub. Service Comm.*, 165 Mich.App. 230, 235, 418 N.W.2d 660 (1987).

Consistently with the law regarding appellate review of an administrative agency's decisions, we give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. *Attorney General v. Pub. Service Comm. No. 2,*

237 Mich.App. 82, 88, 602 N.W.2d 225 (1999). Importantly, we "give great weight to any reasonable construction of a regulatory scheme that the PSC is empowered to administer, *"Champion's Auto Ferry, Inc. v. Pub. Service Comm.*, 231 Mich.App. 699, 708, 588 N.W.2d 153 (1998), but we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros. v. Pub. Service Comm.*, 180 Mich.App. 227, 232, 446 N.W.2d 640 (1989). Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich.App. 675, 682, 658 N.W.2d 849 (2003).

(740 N.W. 2d 685-693)

* * *

(Irrelevant portions of decision excluded)

* * *

C. MEC/PIRGIM's APPEAL IN DOCKET NO. 264131

We note at the outset of our analysis of MEC's and PIRGIM's appeal that these same plaintiffs challenged the PSC's identical determination regarding spent nuclear fuel (SNF) issues in *In re Application of Indiana Michigan Power Co.*, 275 Mich.App. 369, 738 N.W.2d 289 (2007). In Indiana, we rejected each and every legal challenge MEC and PIRGIM raise here. Therefore, for the reasons and on the grounds set forth in our decision in *Indiana* and under the doctrine of collateral estoppel, we reject all of plaintiff's

arguments regarding the SNF-related issues and hold that the PSC properly rejected all of MEC/PIRGIM's SNF-related challenges.

(740 N.W.2d 685, 700-701)

* * *

(Irrelevant portions of decision excluded)

* * *

V. CONCLUSION

We reverse that portion of the PSC's November 23, 2004, order that authorized Edison to impose a surcharge of $0.05 a meter each month on all customers to subsidize its renewable energy program, and reverse the PSC's ruling that Edison may not recover its allocated share of the control premium, but affirm the PSC's orders in all other respects.

(740 N.W. 2d 685, 706)

APPENDIX B

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Filed June 30, 2005]

In the matter of the application of)
THE DETROIT EDISON COMPANY)
to increase rates, amend its rate schedules)
governing the distribution and supply of)
electric energy, implement power supply cost)
recovery plans, factors, and reconciliations in)
its rate schedules for jurisdictional sales of)
electricity, and for miscellaneous accounting)
authority and regulatory asset recovery.)
)

At the June 30, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER DENYING REHEARING

On November 23, 2004, the Commission issued the final order in this rate proceeding. On December 22,

2004, the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM) filed a petition for rehearing and reconsideration of the Commission's treatment of issues surrounding the spent nuclear fuel (SNF) surcharge. On January 10, 2005, Attorney General Michael A. Cox filed an answer to the petition in which he states that he does not take a position on the arguments raised by MEC/PIRGIM, but desires to reserve the right to subsequently challenge the lawfulness or reasonableness of any relief granted by the Commission pursuant to the petition. On January 12, 2005, The Detroit Edison Company (Detroit Edison) filed an answer opposing MEC/PIRGIM's petition for rehearing.

In the November 23 order, the Commission briefly addressed the SNF surcharge as follows:

> MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of [SNF] fees by finding that the matter should not be considered in this proceeding.
>
> The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. See, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771.

Order, p. 120.

MEC/PIRGIM state their understanding that this case presented many complex issues, besides the SNF surcharge, that required prompt and focused attention. However, they argue, now that the major work of producing the final order in the rate case is complete, the Commission should take this opportunity to consider the evidence and arguments presented on SNF issues. They argue that the present case, which combined a general rate proceeding with power supply cost recovery (PSCR) issues, encompasses almost all of the regulatory authority the Commission possesses with respect to an electric utility's recovery of costs. Therefore, they argue, the Commission may require further regulatory investigations, make findings relative to base rates and PSCR factors, and even inquire into nuclear decommissioning issues, as they relate to SNF costs and rate effects.

MEC/PRIGIM argue that the Commission violated its duties to determine rate issues in accordance with its enabling statutes, the Michigan Administrative Procedures Act (APA), MCL 24.201 *et seq.*, and due process. They argue that the Commission actually issued a non-decision concerning SNF costs, despite the presence of "extensive expert testimony and exhibits concerning SNF and cost issues" and full briefing of those issues. Petition, p. 2.

MEC/PRIGIM argue that the Commission's decision fails to comply with the notice and hearing requirements established in its enabling statutes. They argue that MCL 460.6a required prior notice and hearing in cases involving utility rate increase applications. They state that those requirements are applicable to SNF costs, as Detroit Edison included its

SNF fees and other costs for recovery in this case. They argue that if Detroit Edison may include these costs for recovery, then intervenors must be permitted to seek meaningful review and consideration of those costs.

MEC/PRIGIM argue that the Commission has the jurisdiction, authority, and duty under its enabling acts to require Detroit Edison to file a full and complete case regarding its SNF costs, and to thereafter undertake a full review of those costs, and to impose appropriate remedies. They argue that due process rights include the right to an agency decision that makes findings and states conclusions based upon the record as a whole.

MEC/PIRGIM further argue that the Commission should consider additional protective remedies in addition to investigation and review and potential rate disallowance, including a separate SNF decommissioning trust fund, establishment of bond requirements, and inquiry into insurance or additional protection for decommissioning funds. They assert that the Commission should adopt its proposed "enhanced review" of SNF related costs and their recovery, as described by their witness, Ronald Callen.

Further, MEC/PIRGIM argue that the Commission should reject rate recognition of SNF fees because Detroit Edison failed to provide a basis upon which those costs may be deemed reasonable and prudent. They argue that these costs should not be included in rates based on a presumption of reasonableness. Moreover, MEC/PIRGIM assert, Detroit Edison has failed to be reasonable and prudent in continuing to

pay the fees without creating a contingency plan for the probable failure of the federal government to supply a storage facility within any reasonable time. They assert that Detroit Edison failed to demonstrate the reasonableness and prudence of its enforcement actions with regard to the standard contract for SNF disposal.

Moreover, MEC/PIRGIM argue, although Detroit Edison may continue to pay the SNF fee as a matter of management prerogative, the Commission has an independent duty to protect ratepayers by making appropriate rate adjustments. They argue that the Commission need not incorporate the SNF fees in Detroit Edison's rates. MEC/PIRGIM insist that the Commission is not preempted by federal law from disallowing recovery of these fees.

MEC/PIRGIM further argue that the citation to Case No. U-13771 as a forum for issues related to SNF is not comforting, because that proceeding has motions pending before the administrative law judge and the Commission, and no hearings have been scheduled. Moreover, MEC/PIRGIM argue, they seek a different remedy here, the disallowance of SNF fees from rates. They argue that the Commission, on rehearing, has an opportunity to fully consider Detroit Edison's SNF costs and rate issues, including nuclear decommissioning issues.

Detroit Edison responds that MEC/PIRGIM merely restate their arguments from this and prior cases, expressing disagreement with the Commission's consistent rejection of those arguments. Thus, Detroit

Edison argues, the petition for rehearing does not meet the Commission's standards for granting rehearing.

Detroit Edison goes on to argue that no law requires what MEC/PIRGIM demand, and asserts that Detroit Edison's presentation concerning base rates met any reasonable standard of completeness and demonstrated prudent company strategies and actions. The utility argues that MEC/PIRGIM merely rehash their failed appellate attacks on the Commission's rejection of their arguments, citing *MEC* v *Public Service Comm*, unpublished opinion *per curiam* of the Michigan Court of Appeals, decided May 11, 2004 (Docket Nos. 244354 and 246744), that affirmed the Commission's order in Case No. U-12725. Detroit Edison provides a history of the cases in which the SNF issues have arisen and been rejected. *See,* Detroit Edison response to MEC/PIRGIM, p. 4-8.

Moreover, Detroit Edison argues, the SNF arguments raised by MEC/PIRGIM have fatal defects, which the Commission has repeatedly recognized when rejecting them. Detroit Edison states that because federal law requires it to pay these SNF charges and fees, the Commission is preempted from preventing Detroit Edison from recovering these costs in its rates. Detroit Edison argues that the Commission should reject the argument that the utility should be held accountable if the United States Department of Energy fails to meet its statutory duty to obtain and construct a SNF storage facility. In Detroit Edison's view, there is no element of discretion involved as to whether it must make these payments. It argues that adopting the remedies suggested by MEC/PIRGIM will not bring about a speedier resolution to the SNF storage

issues. Rather, it would simply penalize Detroit Edison for the failure of a governmental agency over which Detroit Edison has no control, a penalty without legal or factual basis.

Detroit Edison affirmatively states that it has been reasonable and prudent with respect to its SNF costs, and the relief requested by MEC/PIRGIM would result in an unconstitutional taking. US Const, Am V; Const 1963, art 10, § 2.

Detroit Edison goes on to argue that MEC/PIRGIM has failed to allege or demonstrate any credible basis for finding that SNF costs are unreasonable or imprudent. It asserts that its costs are presumed to be reasonable and prudent, and beyond that, the utility has taken reasonable and prudent actions with regard to its SNF costs. To withhold the payments required by federal law, Detroit Edison states, would risk the loss of Fermi 2's license. Detroit Edison points out that, in previous cases, Detroit Edison has demonstrated its substantial actions regarding SNF costs.

Finally, Detroit Edison argues, MEC/PIRGIM seek relief that is outside the Commission's authority and jurisdiction.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement

with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

The Commission finds that the petition for rehearing should be denied, as the petition does not meet the standards for granting rehearing. MEC/PIRGIM merely raises again the same arguments that the Commission should involve itself in judging the reasonableness of costs assessed by federal statute. The Commission finds that Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise.

As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The petition for rehearing filed by MEC/PIRGIM of the November 23, 2004 order should be denied.

THERFORE, IT IS ORDERED that the December 22, 2004 petition for rehearing filed by the Michigan Environmental Council and the Public Interest Research Group in Michigan is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

(SEAL)

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of June 30, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

b. The petition for rehearing filed by MEC/PIRGIM of the November 23, 2004 order should be denied.

THERFORE, IT IS ORDERED that the December 22, 2004 petition for rehearing filed by the Michigan Environmental Council and the Public Interest Research Group in Michigan is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

(SEAL)

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of June 30, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX C

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Filed November 23, 2004]

In the matter of the application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate schedules	)
governing the distribution and supply of	)
electric energy, implement power supply cost	)
recovery plans, factors, and reconciliations in	)
its rate schedules for jurisdictional sales of	)
electricity, and for miscellaneous accounting	)
authority and regulatory asset recovery.	)
	)

At the November 23, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

[pp. 1-4]

I. Preface

This order is the culmination of the efforts of eighteen parties and countless individuals. It represents the end product of an investigation into the operations of the largest electric utility in this state whose rates have not been subject to similar scrutiny in over a decade.

Earlier, the Commission recognized that this proceeding was "among the most complex cases ever considered." November 4, 2003 order, Case No. U-13808, p. 8. It affects not only the operations of the utility, but also the finances of over two million of its residential and business customers in ways that no proceeding brought before this agency has ever done. In addition to resetting the utility's rates on both an interim and a final basis, the application requested approval of a regulatory asset recovery surcharge, reinstatement of the company's power supply cost recovery (PSCR) mechanism, a determination of the utility's stranded costs, and implementation of a novel "mitigation adjustment" designed to allow the utility "to retain the economic benefit associated with the mitigation of generation contribution margin loss when customers leave bundled tariff service." Application, ¶14, p. 5. The application also sought approval of an earnings-sharing mechanism, termination of securitization and transition charges for electric choice customers, and authorization for use of excess securitization savings to recover previously deferred and unrecovered net stranded costs.

Despite having so much at stake, the parties engaged in their various adversarial roles in a professional manner. For that, the Commission is thankful. Moreover, all participants, including the Commission's employees, should be commended for completing this enormous undertaking in so timely a manner.

II. History of Proceedings

On June 20, 2003, The Detroit Edison Company (Detroit Edison) filed an application for an increase in its rate schedules governing distribution and supply of electric energy, determination of its stranded costs, implementation of its PSCR clause, and other various accounting and regulatory matters.[1]

On July 28, 2003, Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ) conducted a prehearing conference, which was attended by Detroit Edison, the National Energy Marketers Association (NEMA), Constellation NewEnergy (CNE), Energy Michigan, the Association of Businesses Advocating Tariff Equity (ABATE), The Kroger Co. (Kroger), Energy Conversions LLC., Mackinaw Power LLC (Mackinaw), North American Wind Energy LLC (NAWE), the Michigan Environmental Council and the Public Interest Research Group in Michigan (MEC/PIRGIM), the Residential Ratepayers Consortium (RRC), Utility Workers Local 223, Pietro Zebri, Douglas Moore,

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[1] Prior to filing this proceeding, Detroit Edison's rates were last comprehensively reviewed and determined by the Commission in its January 21, 1994 order in Case No. U-10102.

Nordic Marketing LLC (Nordic), Attorney General Michael A. Cox (Attorney General), and the Commission Staff (Staff). The ALJ granted petitions to intervene filed by NEMA, CNE, Energy Michigan, ABATE, Kroger, Energy Conversions, Mackinaw, NAWE, MEC/PIRGIM, the RRC, Utility Workers Local 223, Mr. Zebri, Mr. Moore, Nordic, and the Attorney General.[2] Then, the ALJ granted a motion by ABATE, Energy Michigan, and Kroger to suspend the proceeding pending Detroit Edison's decision to make a possible securitization filing. Detroit Edison applied for leave to appeal the ALJ's ruling to the Commission.

A second prehearing was held on August 8, 2003. At that time, Detroit Edison informed the ALJ that it had decided not to file a securitization case until after the filing of reply briefs and that the company would be withdrawing its application for leave to appeal. Accordingly, the ALJ set a schedule for the interim rate relief hearing.

On August 18, 2003, the Commission ordered the parties to brief the issue concerning Detroit Edison's reinstatement of its PSCR clause.[3]

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[2] On March 5, 2004, United Utilities, L.L.C., filed a petition for late intervention, which was denied by the ALJ at 11 Tr. 1833. United Utilities did not appeal this ruling, but it did submit comments by letter on April 26, 2004.

[3] On December 18, 2003, an order was issued by the Commission reinstating Detroit Edison's PSCR clause. Detroit Edison filed an appeal of the Commission order with the Court of Appeals.

On August 19, 2003, Detroit Edison filed an application for leave to appeal the schedule set by the ALJ. On November 4, 2003, the Commission issued an order changing the deadlines for filing briefs and reply briefs in the interim relief schedule. Hearings were conducted on the interim relief portion of the case on January 5-13, 2004.

On February 4, 2004, briefs regarding interim relief were filed by Detroit Edison, the Staff, MEC/PIRGIM, ABATE, the Attorney General, Kroger, the RRC, and Energy Michigan. Reply briefs were filed by Detroit Edison, the Staff, CNE, ABATE, the Attorney General, Kroger, the RRC, and Energy Michigan on February 10, 2004.

On February 20, 2004, the Commission issued its order granting, in part, Detroit Edison's request for interim relief, which authorized Detroit Edison to increase its rates by $248,430,000 on an annual basis and to place into effect certain interim surcharges. Several parties sought rehearing of the February 20 order.

The ALJ conducted hearings on the final relief portion of the case on April 12-21, 2004. The record consists of 15 volumes of transcript totaling 3,239 pages. In addition, 235 exhibits were admitted into evidence. Briefs and reply briefs were filed on May 14, 2004 and May 28, 2004 by Detroit Edison, the Staff, the Attorney General, ABATE, MEC/PIRGIM, Energy Michigan, Kroger, the RRC, Mackinaw, CNE, and NAWE.

On August 26, 2004, the ALJ issued his Proposal for Decision (PFD). Exceptions and replies to exceptions were timely filed by Detroit Edison, the Staff, the Attorney General, ABATE, MEC/PIRGIM, Energy Michigan, Kroger, the RRC, and CNE on September 16 and October 7, 2004, respectively.[4]

* * *

[p. 17]

The ALJ also recommended that the Commission reject MEC/PIRGIM's position regarding spent nuclear fuel (SNF) in its entirety, noting that the Commission had rejected similar arguments in previous cases. Further, the ALJ expressed his belief that no policy changes were warranted to justify the relief sought by MEC/PIRGIM. Therefore, the ALJ recommended that Detroit Edison be authorized to continue the collection of SNF fees and costs in accordance with the federal Nuclear Waste Policy Act of 1982, 42 USC 10101 et seq. (NWPA).

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[4] Together, the documents contained in the docket of this case encompass nearly 13,000 pages of testimony, exhibits, comments, and legal pleadings. All of this information may be viewed at http://efile.mpsc.cis.state.mi.us/cgi-bin/efile/viewcase.pl?casenum=13808.

[p. 120]

* * *

XV. Spent Nuclear Fuel Surcharge

MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of spent nuclear fuel (SNF) fees by finding that the matter should not be considered in this proceeding.

The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. See, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771.

* * *

[pp. 127-130]

* * *

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 300, as amended, MCL 462.2 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. Detroit Edison is experiencing a revenue deficiency in the annual amount of $335,812,000 and, according to the terms of this order, an increase in its annual revenues is warranted.

c. Detroit Edison should be directed to file an application to resolve other remaining stranded cost issues addressed in this order in conjunction with its PSCR reconciliation cases.

d. Detroit Edison should be directed to meet with interested parties to discuss the implementation of a program containing the essential elements of the PAYS® concept and the unresolved electric choice metering issues. Detroit Edison should include any tariff proposal for which there is substantial agreement in its next general rate case application. The company should also be directed to file a report with the Commission no later than March 15, 2005.

e. The petitions for rehearing of the February 20, 2004 interim order should be dismissed.

f. The bond requirement established by the February 20, 2004 interim order should be rescinded.

g. Detroit Edison should be directed to file an application to unbundled its rates and to resolve certain other rate subsidiaries and imbalances between distribution rates of bundled and unbundled customers on or before March 23, 2005.

h. Detroit Edison should be ordered to implement an REP as set forth in the order.

THEREFORE, IT IS ORDERED that:

A. The Detroit Edison Company is authorized to increase its annual electric revenues by $335,812,000 consistent with rate cap provisions of 2000 PA 141 for service rendered on and after November 24, 2004 and as provided in this order, which is $87,382,000 above interim relief.

B. Within 30 days, The Detroit Edison Company shall file revised rate schedules reflecting the rates approved in this order and set forth on Exhibit A.

C. The Detroit Edison Company shall file a proceeding to address other remaining stranded cost issues addressed in this order.

D. The Detroit Edison Company shall immediately convene collaborative meetings with interested parties and the Commission Staff to discuss the implementation of a program containing the essential elements of the PAYS® concept and the unresolved electric choice metering issues. The company shall file reports of the agreed resolutions on these issues with the Commission as soon as any resolutions are reached, but no later than March 15, 2005.

E. The petitions for rehearing of the February 20, 2004 interim order are rejected.

F. The bond requirement established by the February 20, 2004 interim order is rescinded.

G. The Detroit Edison Company shall file an application to unbundled its rates and to resolve

certain other rate subsidies and imbalances between distribution of bundled and unbundled customers on or before March 23, 2005.

H. The Detroit Edison Company shall continue the Low Income and Energy Efficiency Fund program authorized in the February 20, 2004 order in this proceeding.

I. Due to their length, the revised tariff sheets approved this order are included in the Commission's docket file for this proceeding, but they have not been attached to copies of this order. However, an electronic version of the revised tariff sheets does appear on the Commission's website.

J. The Detroit Edison Company is directed to implement a renewable energy program as set forth in the order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of November 23, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of November 23, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

APPENDIX D

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Filed August 26, 2004]

In the matter of the application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate schedules	)
governing the distribution and supply of	)
electric energy, implement power supply cost	)
recovery plans, factors, and reconciliations in	)
its rate schedules for jurisdictional sales of	)
electricity, and for miscellaneous accounting	)
authority and regulatory asset recovery.	)
	)

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

[p.1]

On June 20, 2003 The Detroit Edison Company (Detroit Edison or the Company) filed its application for an increase in its rate schedule governing

distribution and supply of electric energy, implementation of its power supply cost recovery (PSCR) clause and other various accounting and regulatory matters. Along with its application, Detroit Edison filed direct testimony and exhibits. On July 3, 2003 the Michigan Public Service Commission (Commission) issued a notice of prehearing conference.

* * *

[pp. 109-113]

* * *

Spent Nuclear Fuel (SNF)

Detroit Edison takes the position that the Commission should reject MEC/PIRGIM's position regarding spent nuclear fuel (SNF) in its entirety. Detroit Edison argues that the Commission has consistently rejected MEC/PIRGIM's exact position in numerous past Commission orders. Detroit Edison continues that federal preemption requires the Commission to allow Detroit Edison the ability to recover all SNF fees and costs. In addition, Detroit Edison argues that all SNF costs and fees have been reasonably and prudently incurred. Detroit Edison adds MEC/PIRGIM has failed to allege or demonstrate any credible basis for finding that SNF costs and fees were unreasonable or imprudent. Further, Detroit Edison argues that the revocation of Detroit Edison's ability to collect SNF costs and fees would result in an unconstitutional "taking". Finally, Detroit Edison argues that MEC/PIRGIM seeks relief that is outside the Commission's statutory authority and jurisdiction.

MEC/PIRGIM argues that the Commission should undertake a thorough review of all Detroit Edison's SNF fees and costs. MEC/PIRGIM argues that Detroit Edison has not filed a plan or any adequate evidence to establish that the SNF fees and costs are reasonable and prudent. In addition, MEC/PIRGIM argues that Detroit Edison has not established that the minimal amount of SNF costs and fees, in accordance with *Wisconsin Electric*[34], are being paid. Further, MEC/PIRGIM states that the SNF fees and costs being collected by Detroit Edison are being paid for a permanent depository in which does not exist. MEC/PIRGIM takes the position that the federally mandated collection of SNF fees and costs could result in billions of dollars in losses to ratepayers, if the federal government fails to build a permanent depository for SNF. Finally, MEC/PIRGIM argues that the Commission has authority under Act 304 to adopt appropriate remedies to protect ratepayers and the public's interest from this potential default.

The ALJ finds that Detroit Edison presents the appropriate position concerning SNF fees and costs. Additionally, the ALJ is persuaded that the MEC/PIRGIM position is unsupported based on prior Commission precedent. Finally, the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena.

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[34] *Wisconsin Electric Company v. DOE*, 250 U.S. App. D.C. 128.

In 1982, Congress instituted the Nuclear Waste Policy Act[35] (NWPA) to create the framework for the operation and management of a permanent site for the disposal of SNF; as well as creating a funding mechanism for the administration of the depository. Congress enacted legislation to establish a disposal method to accommodate the ever-ncreasing amount of SNF produced by private sector nuclear power generation. The NWPA is "a comprehensive statute that provides for the establishment of a geologic depository for disposal of high-level radioactive waste by the Department of Energy"[36] (DOE). Under the NWPA, all civilian nuclear power generating utilities are required to contract with the DOE and provide prepayment for waste disposal services they will ultimately require. Congress has established the rate to be paid by these utilities into the NWF at 1.0 mil per kilowatt-hour.[37] This rate would be paid to the NWF in exchange for the transfer of title, transportation, and disposal of all SNF.[38] This prepayment is deposited into the Nuclear Waste Fund[39] (NWF) and held by the Secretary of the Treasury[40]. The NWF may be used only for "purposes

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[35] 42 USC §§ 10101 et seq.

[36] *Texas v. United States DOE*, 754 F2d 550 (CA 5 1985).

[37] 42 USC §§ 10222(a)(2).

[38] 42 USC §§ 10222(a)(1).

[39] 42 USC §§ 10222(c).

[40] 42 USC §§ 10222(e).

of radioactive waste disposal activities"[41], which include "the administrative cost of the radioactive waste disposal program"[42] and "the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site."[43]

The ALJ finds that the Commission has established the correct position regarding the reasonableness and prudently incurred SNF costs in *U-12613*[44]. In this case, MEC/PIRGIM had intervened to argue for the Commission to require Wisconsin Public Service Corporation (WPS) to escrow the NWF payments, post a performance bond, or purchase liability insurance. These measures were recommended by MEC/PIRGIM to provide an alternative funding source in case of a complete DOE default in accepting SNF. MEC/PIRGIM cited Act 304 as the authority for the Commission to enact the proposed remedies.

The ALJ, in *U-12613*[45], found that Act 304 did not authorize the proposed remedies sought by MEC/PIRGIM. The Commission adopted the ALJ's findings and stated,

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[41] 42 USC §§ 10222(d).

[42] 42 USC §§ 10222(d)(3).

[43] 42 USC §§ 10222(d)(5).

[44] *MPSC Case No. U-12613*, dated November 20, 2001.

[45] id.

> Undoubtedly, the waste disposal issues confronting WPS Corp and the nuclear industry as a whole are significant, and a solution will not be implemented in accordance with the DOE's contractual timetable. However, the Commission finds that the MEC/PIRGIM's proposals are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of the WPS Corp's management that adversely affects the rates paid by PSCR customers. The problem is larger than WPS Corp's nuclear operation, feasible alternatives to the DOE's construction of a permanent repository are not readily apparent, and the Commission is unable to find that WPS Corp has been imprudent. Moreover, the MEC/PIRGIM's remedial proposals are beyond the scope of a PSCR proceeding.[46]

The ALJ is of the opinion that the Commission's order in *U-12613*[47] is equally applicable to the instant rate case. The ALJ finds no superceding issues or legal developments that would warrant an alternative conclusion from the Commission's ruling in *U-12613*[48][49]. The ALJ is persuaded that the Commission has elected to defer to the requirements

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[46] id. at 8-9.

[47] id.

[48] id.

[49] *U-12613* was a Wisconsin Electric application for a PSCR plan.

established under the NWPA[50] and wait patiently until the permanent SNF depository at Yucca Mountain, Nevada is completed.[51]

The ALJ recommends that the Commission reject MEC/PIRGIM's position regarding SNF in its entirety. The ALJ is convinced the Commission has properly and adequately addressed the SNF issue in numerous prior cases[52]. Further, the ALJ is of the opinion that there have been no developments that would warrant a policy change to justify the relief sought by MEC/PIRGIM. Finally, the ALJ recommends that Detroit Edison continue the collection of SNF fees and costs in accordance with the NWPA[53].

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[50] supra

[51] According to the DOE, the projected date of completion of Yucca Mountain is 2010.

[52] See: *MPSC Case. Nos. U-11314, U-11495, U-12121, U-12613, U-12615*, and *U-12725*.

[53] 42 USC § 10101, et seq.

APPENDIX E

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket Nos. 134667-69 & (45);
134671; 134673-74; 134676-77

[Filed September 19, 2008]

SC: 134667
COA: 259845
MPSC: U-13808

ATTORNEY GENERAL,
Appellant,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC.,
Appellees.

SC: 134668
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY;
Appellee,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, and CONSTELLATION NEWENERGY, INC.,
Appellees,

and

ATTORNEY GENERAL,
Appellant.

SC: 134669
COA: 264191
MPSC: U-13808

ATTORNEY GENERAL,
Appellant,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, ENERGY MICHIGAN, INC., CONSTELLATION NEWENERGY, INC., and ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellees.

SC: 134671
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

MICHIGAN PUBLIC SERVICE COMMISSION,
Appellant.

SC: 134673
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

MICHIGAN PUBLIC SERVICE

COMMISSION, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

MICHIGAN ENVIRONMENTAL COUNCIL, and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants.

SC: 134674
COA: 264131
MPSC: U-13808

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN,
Appellants,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, and CONSTELLATION NEWENERGY, INC.,
Appellees.

SC: 134676
COA: 264099
MPSC: U-13808

DETROIT EDISON COMPANY,
Appellee,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN ENVIRONMENTAL COUNCIL, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees,

and

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellant.

SC: 134677
COA: 264156
MPSC: U-13808

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,
Appellant,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, DETROIT EDISON COMPANY, ENERGY MICHIGAN, INC., CONSTELLATION NEWENERGY, INC., and ATTORNEY GENERAL,
Appellees.

ORDER

On order of the Court, the motion of Detroit Edison Company to exceed the page limit is GRANTED. The applications for leave to appeal the July 3, 2007 judgment of the Court of Appeals are considered, and they are GRANTED, limited to: (1) whether "transmission costs" may be included in the power supply cost recovery factor, MCL 460.6j(1)(a) and (b); and (2) whether the Court of Appeals erred in concluding that the Michigan Public Service Commission's decision to prohibit recovery of the control premium that DTE Energy paid to acquire MCN Energy by including the premium in Detroit Edison's rates was not supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90 (July 23, 2008) (Docket Nos. 134493, 134500), slip op at 11-12.

We further ORDER that these cases be argued and submitted to the Court together with the case of *Attorney General v Michigan Public Service Commission* (Docket No. 136431), at such future session of the Court as these cases are ready for submission.

Seal of the Michigan
Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX F

Nuclear Wast Policy Act of 1982, as amended, 42 U.S.C. § 10101 et seq. (Relevant Provisions)

CHAPTER 108—NUCLEAR WASTE POLICY

42 U.S.C. § 10101. Definitions

For purposes of this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "affected Indian tribe" means any Indian tribe—

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: *Provided*, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe,

that such effects are both substantial and adverse to the tribe;[1]

(3) The term "atomic energy defense activity" means any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

(A) naval reactors development;
(B) weapons activities including defense inertial confinement fusion;
(C) verification and control technology;
(D) defense nuclear materials production;
(E) defense nuclear waste and materials by-products management;
(F) defense nuclear materials security and safeguards and security investigations; and
(G) defense research and development.

(4) The term "candidate site" means an area, within a geologic and hydrologic system, that is recommended by the Secretary under section 10132 of this title for site characterization, approved by the President under section 10132 of this title for site characterization, or undergoing site characterization under section 10133 of this title.

(5) The term "civilian nuclear activity" means any atomic energy activity other than an atomic energy defense activity.

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[1] So in original. The semicolon probably should be a period.

(6) The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under section 2133 or 2134 (b) of this title.

(7) The term "Commission" means the Nuclear Regulatory Commission.

(8) The term "Department" means the Department of Energy.

(9) The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.

(10) The terms "disposal package" and "package" mean the primary container that holds, and is in contact with, solidified high-level radioactive waste, spent nuclear fuel, or other radioactive materials, and any overpacks that are emplaced at a repository.

(11) The term "engineered barriers" means manmade components of a disposal system designed to prevent the release of radionuclides into the geologic medium involved. Such term includes the high-level radioactive waste form, high-level radioactive waste canisters, and other materials placed over and around such canisters.

(12) The term "high-level radioactive waste" means—

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and

any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

(13) The term "Federal agency" means any Executive agency, as defined in section 105 of title 5.

(14) The term "Governor" means the chief executive officer of a State.

(15) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602 (c)).

(16) The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, transuranic waste, or by-product material as defined in section 2014 (e)(2) of this title; and

(B) the Commission, consistent with existing law, classifies as low-level radioactive waste.

(17) The term "Office" means the Office of Civilian Radioactive Waste Management established in section 10224[2] of this title.

(18) The term "repository" means any system licensed by the Commission that is intended to be used for, or may be used for, the permanent deep geologic disposal of high-level radioactive waste and spent nuclear fuel, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. Such term includes both surface and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted.

(19) The term "reservation" means—

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

(20) The term "Secretary" means the Secretary of Energy.

(21) The term "site characterization" means—

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

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[2] See References in Text note below.

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

(22) The term "siting research" means activities, including borings, surface excavations, shaft excavations, subsurface lateral excavations and borings, and in situ testing, to determine the suitability of a site for a test and evaluation facility.

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(25) The term "storage" means retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such

waste or fuel for subsequent use, processing, or disposal.

(26) The term "Storage Fund" means the Interim Storage Fund established in section 10156 (c)[3] of this title.

(27) The term "test and evaluation facility" means an at-depth, prototypic, underground cavity with subsurface lateral excavations extending from a central shaft that is used for research and development purposes, including the development of data and experience for the safe handling and disposal of solidified high-level radioactive waste, transuranic waste, or spent nuclear fuel.

(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(29) The term "Waste Fund" means the Nuclear Waste Fund established in section 10222 (c) of this title.

(30) The term "Yucca Mountain site" means the candidate site in the State of Nevada recommended by the Secretary to the President under section 10132 (b)(1)(B) of this title on May 27, 1986.

(31) The term "affected unit of local government" means the unit of local government with jurisdiction

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[3] See References in Text note below.

over the site of a repository or a monitored retrievable storage facility. Such term may, at the discretion of the Secretary, include units of local government that are contiguous with such unit.

(32) The term "Negotiator" means the Nuclear Waste Negotiator.

(33) As used in subchapter IV of this chapter, the term "Office" means the Office of the Nuclear Waste Negotiator established under subchapter IV of this chapter.

(34) The term "monitored retrievable storage facility" means the storage facility described in section 10161 (b)(1) of this title.

(Pub. L. 97–425, § 2, Jan. 7, 1983, 96 Stat. 2202; Pub. L. 100–202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329–104, 1329–121; Pub. L. 100–203, title V, § 5002, Dec. 22, 1987, 101 Stat. 1330–227.)

* * *

SUBCHAPTER I—DISPOSAL AND STORAGE OF HIGH-LEVEL RADIOACTIVE WASTE, SPENT NUCLEAR FUEL, AND LOW-LEVEL RADIOACTIVE WASTE

* * *

Part A—Repositories for Disposal of High-Level Radioactive Waste and Spent Nu-clear Fuel

42 U.S.C. § 10131. Findings and purposes

(a) The Congress finds that—

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) The purposes of this part are—

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such

waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

(Pub. L. 97-425, title I, §111, Jan. 7, 1983, 96 Stat. 2207.)

* * *

Part B—INTERIM STORAGE PROGRAM

42 U.S.C. § 10151. Findings and purposes

(a) The Congress finds that—

(1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing, to the extent practical, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner where practical;

(2) the Federal Government has the responsibility to encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor; and

(3) the Federal Government has the responsibility to provide, in accordance with the provisions of this part, not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity at the sites of such reactors

when needed to assure the continued, orderly operation of such reactors.

(b) The purposes of this part are—

(1) to provide for the utilization of available spent nuclear fuel pools at the site of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical at the site of such reactor; and

(2) to provide, in accordance with the provisions of this part, for the establishment of a federally owned and operated system for the interim storage of spent nuclear fuel at one or more facilities owned by the Federal Government with not more than 1,900 metric tons of capacity to prevent disruptions in the orderly operation of any civilian nuclear power reactor that cannot reasonably provide adequate spent nuclear fuel storage capacity at the site of such reactor when needed.

(Pub. L. 97-425, title I, §131, Jan. 7, 1983, 96 Stat. 2229.)

42 U.S.C. § 10152. Available capacity for interim storage of spent nuclear fuel

The Secretary, the Commission, and other authorized Federal officials shall each take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor consistent with—

(1) the protection of the public health and safety, and the environment;
(2) economic considerations;
(3) continued operation of such reactor;
(4) any applicable provisions of law; and
(5) the views of the population surrounding such reactor.

(Pub. L. 97-425, title I, §132, Jan. 7, 1983, 96 Stat. 2230.)

* * *

SUBCHAPTER III—OTHER PROVISIONS RELATING TO RADIOACTIVE WASTE

42 U.S.C. § 10222. Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d) of this section.

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) of this section.[1] In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether

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[1] See References in Text note below.

collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that—

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.[1]

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1) (A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless—

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than—

(A) June 30, 1983; or
(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of—

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e) of this section, which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including—

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

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[2] So in original. The comma probably should not appear.

[3] So in original. Probably should be followed by a comma.

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,[2] retrievable storage site[3] or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored,[2] retrievable storage site[3] or a test and evaluation facility site and necessary or incident to such repository, monitored,[2] retrievable storage facility[3] or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter[4] for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

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[4] See References in Text note below.

(e) Administration of Waste Fund

(1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States—

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average

market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter,[5] the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under

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[5] See References in Text note below.

this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such Act[5] are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) of this section shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

(Pub. L. 97-425, title III, §302, Jan. 7, 1983, 96 Stat. 2257.)

REFERENCES IN TEXT

Subsection (c) of this section, referred to in subsec. (a)(3), was in the original "subsection (c) 126(b)" and was translated as subsection (c) of this section as the probable intent of Congress in view of the establishment of the Nuclear Waste Fund by subsec. (c) of this section and the absence of a section 126 in Pub. L. 97-425.

This subchapter, referred to in subsecs. (a)(5)(B), (d), and (e)(5), was in the original "this subtitle", and was translated as this subchapter to reflect the probable intent of Congress because title III of Pub. L. 97-425, which enacted this subchapter, does not contain subtitles.

Such Act, referred to in subsec. (e)(5), probably means chapter 31 of Title 31, Money and Finance.

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (e)(1) of this subsection relating to annual report to Congress, see section 303 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and the 4th item on page 143 of House Document No. 103-7.

42 U.S.C. § 10223. Alternative means of financing

The Secretary shall undertake a study with respect to alternative approaches to managing the construction and operation of all civilian radioactive waste management facilities, including the feasibility

of establishing a private corporation for such purposes. In conducting such study, the Secretary shall consult with the Director of the Office of Management and Budget, the Chairman of the Commission, and such other Federal agency representatives as may be appropriate. Such study shall be completed, and a report containing the results of such study shall be submitted to the Congress, within 1 year after January 7, 1983.

(Pub. L. 97-425, title II, §303, Jan. 7, 1983, 96 Stat. 2261.)

42 U.S.C. § 10224. Office of Civilian Radioactive Waste Management

(a) Establishment

There hereby is established within the Department of Energy an Office of Civilian Radioactive Waste Management. The Office shall be headed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be compensated at the rate payable for level IV of the Executive Schedule under section 5315 of title 5.

(b) Functions of Director

The Director of the Office shall be responsible for carrying out the functions of the Secretary under this chapter, subject to the general supervision of the Secretary. The Director of the Office shall be directly responsible to the Secretary.

(c) Annual report to Congress

The Director of the Office shall annually prepare and submit to the Congress a comprehensive report on the activities and expenditures of the Office.

(d) Audit by GAO

If requested by either House of the Congress (or any committee thereof) or if considered necessary by the Comptroller General, the Government Accountability Office shall conduct an audit of the Office, in accord with such regulations as the Comptroller General may prescribe. The Comptroller General shall have access to such books, records, accounts, and other materials of the Office as the Comptroller General determines to be necessary for the preparation of such audit. The Comptroller General shall submit a report on the results of each audit conducted under this section.

(Pub. L. 97-425, title III, §304, Jan. 7, 1983, 96 Stat. 2261; Pub. L. 104-66, title I, §1052(l), Dec. 21, 1995, 109 Stat. 719; Pub. L. 108-271, §8(b), July 7, 2004, 118 Stat. 814.)

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APPENDIX G

TITLE 10: ENERGY
CHAPTER III—DEPARTMENT OF ENERGY
SUBCHAPTER I—SALES REGULATION

PART 961—STANDARD CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

Subpart A—General

Sec.

§ 961.1 Purpose.
§ 961.2 Applicability.
§ 961.3 Definitions.
§ 961.4 Deviations.
§ 961.5 Federal agencies.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

AUTHORITY: Sec. 644, Pub. L. 95–91, 91 Stat. 599 (42 U.S.C. 7254) and sec. 302, Pub. L. 97–425, 96 Stat. 2257 (42 U.S.C. 10222).

SOURCE: 48 FR 16599, Apr. 18, 1983, unless otherwise noted.

Subpart A—General

§ 961.1 Purpose.

This part establishes the contractual terms and conditions under which the Department of Energy (DOE) will make available nuclear waste disposal services to the owners and generators of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) as provided in section 302 of the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). Under the contract set forth in §961.11 of this part, DOE will take title to, transport, and dispose of spent nuclear fuel and/or high-level radioactive waste delivered to DOE by those owners or generators of such fuel or waste who execute the contract. In addition, the contract will specify the fees owners and generators of SNF and/or HLW will pay for these services. All receipts, proceeds, and revenues realized by DOE under the contract will be deposited in the Nuclear Waste Fund, an account established by the Act in the U.S. Treasury. This fund will pay for DOE's radioactive waste disposal activities, the full costs of which will be borne by the owners and generators under contract with DOE for disposal services.

§ 961.2 Applicability.

This part applies to the Secretary of Energy or his designee and any person who owns or generates spent nuclear fuel or high-level radioactive waste, of domestic origin, generated in a civilian nuclear power reactor. If executed in a timely manner, the contract contained in this part will commit DOE to accept title to, transport, and dispose of such spent fuel and waste.

In exchange for these services, the owners or generators of such fuel or waste shall pay fees specified in the contract which are intended to recover fully the costs of the disposal services to be furnished by DOE. The contract must be signed by June 30, 1983, or by the date on which such owner or generator commences generation of, or takes title to, such spent fuel or waste, whichever occurs later.

§ 961.3 Definitions.

For purposes of this part—

Act means the Nuclear Waste Policy Act of 1982, Public Law 97–425, 96 Stat. 2201 *et seq.*, 42 U.S.C. 10101 *et seq.*

Contract means the agreement set forth in §961.11 of this part and any duly executed amendment or modification thereto.

Generator means any person who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of section 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134).

Owner means any person who has title to spent nuclear fuel or high-level radioactive waste.

Purchaser means any person, other than a Federal agency, who is licensed by the Nuclear Regulatory Commission to use a utilization or production facility under the authority of sections 103 or 104 of the Atomic Energy Act of 1954 (42 U.S.C. 2133, 2134) or

who has title to spent nuclear fuel or high level radioactive waste and who has executed a contract with DOE.

Secretary means the Secretary of Energy of his designee.

Other definitions relating to the subject matter of this rule are set forth in Article II of the contract which is contained in §961.11, Text of the contract, of this part.

§ 961.4 Deviations.

Requests for authority to deviate from this part shall be submitted in writing to the Contracting Officer, who shall forward the request for approval to the Senior Procurement Official, Headquarters. Each request for deviation shall contain the following information:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the contract;

(b) A description of the intended effect of the deviation;

(c) The reason why the deviation is considered necessary or would be in the best interests of the Government;

(d) The name of the owner or generator seeking the deviation and nuclear power reactor(s) affected;

(e) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information will contribute to a full understanding of the desired deviation.

§ 961.5 Federal agencies.

Federal agencies or departments requiring DOE's disposal services for SNF and/or HLW will be accommodated by a suitable interagency agreement reflecting, as appropriate, the terms and conditions set forth in the contract in §961.11; *Provided, however,* that the fees to be paid by Federal agencies will be equivalent to the fees that would be paid under the contract.

Subpart B—Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

§ 961.11 Text of the contract.

The text of the standard contract for disposal of spent nuclear fuel and/or high/level radioactive waste follows:

U.S. DEPARTMENT OF ENERGY CONTRACT NO.

___

Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste

THIS CONTRACT, entered into this _____ day of _____ 19___, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and _____, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of ____ [add as applicable: "acting on behalf of itself and ___."].

Witnesseth that:

Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors in order to protect the public health and safety, and the environment; and

Whereas, the DOE has the responsibility, following commencement of operation of a repository, to take title to the spent nuclear fuel or high-level radioactive waste involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent nuclear fuel; and

Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear

power reactors shall be borne by the owners and generators of such fuel and waste; and

Whereas, the DOE is required to collect a full cost recovery fee from owners and generators delivering to the DOE such spent nuclear fuel and/or high level radioactive waste; and

Whereas, the DOE is authorized to enter into contracts for the permanent disposal of spent nuclear fuel and/or high-level radioactive waste of domestic origin in DOE facilities; and

Whereas, the Purchaser desires to obtain disposal services from DOE; and

Whereas, DOE is obligated and willing to provide such disposal services, under the terms and conditions hereinafter set forth; and

Whereas, this contract is made and entered into under the authority of the DOE Organization Act (Pub. L. 95–91, 42 U.S.C. 7101 *et seq.*) and the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425, 42 U.S.C. 10101 *et seq.*)

Now, therefore, the parties hereto do hereby agree as follows:

ARTICLE I—DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

1. The term *assigned three-month period* means the period that each Purchaser will be assigned by DOE, giving due consideration to the Purchaser's assignment preference, for purposes of reporting kilowatt hours generated by the Purchaser's nuclear power reactor and for establishing fees due and payable to DOE.

2. The term *cask* means a container for shipping spent nuclear fuel and/or high-level radioactive waste which meets all applicable regulatory requirements.

3. The term *civilian nuclear power reactor* means a civilian nuclear powerplant required to be licensed under sections 103 or 104(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2133, 2134(b)).

4. The term *Commission* means the United states Nuclear Regulatory Commission.

5. The term *contract* means this agreement and any duly executed amendment or modification thereto.

6. The term *Contracting Officer* means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly disignated Contracting Officer of the DOE; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

7. The term *delivery* means the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the

Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.

8. The term *disposal* means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive waste with no foreseeable intent of recovery, whether or not such emplacement permits recovery of such waste.

9. The term *DOE* means the United States Department of Energy or any duly authorized representative thereof, including the Contracting Officer.

10. The term *DOE facility* means a facility operated by or on behalf of DOE for the purpose of disposing of spent nuclear fuel and/or high-level radioactive waste, or such other facility(ies) to which spent nuclear fuel and/or high-level radioactive waste may be shipped by DOE prior to its transportation to a disposal facility.

11. The term *full cost recovery,* means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97–425). As used herein, the term *cost* includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302 (d) and (e) of the said Act and all other uses specified in the Act.

12. The term *high-level radioactive waste* (HLW) means—

(a) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentrations; and

(b) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

13. The term *electricity (kilowatt hours) generated and sold* means gross electrical output produced by a civilian nuclear power reactor measured at the output terminals of the turbine generator minus the normal onsite nuclear station service loads during the time electricity is being generated multiplied by the total energy adjustment factor. For purposes of this provision, the following definition shall apply:

a. The term *Total Energy Adjustment Factor (TEAF)* means the sum of individual owners' weighted energy adjustment factors.

b. The term *Weighted Energy Adjustment Factor (WEAF)* means the product of an owner's energy adjustment factor times the owner's share of the plant.

c. The term *Owner's Energy Adjustment Factor (OEAF)* means the sum of the individual owner's adjustment for sales to ultimate consumers and adjustment for sales for resale.

d. The term *Owner's Share of the plant (OS)* means the owner's fraction of metered electricity sales, the owner's fraction of plant ownership, or the sponsor company's fixed entitlement percentage of the plant's output. This definition includes joint owners of

generating companies or participants in a generation and transmission cooperative.

e. The term *Adjustment for Sales to ultimate Consumer (ASC)* means the owner's fraction of sales to the ultimate consumer multiplied by the owner's sales to ultimate consumer adjustment factor.

f. The term *Fraction of Sales to ultimate Consumer (FSC)* means the owner's fractional quantity of electricity sold to the ultimate consumer relative to the total of electricity sales (sales to ultimate consumers plus the sales for resale).

g. The term *Sales to ultimate Consumer Adjustment Factor (SCAF)* means one minus the quotient of all electricity lost or otherwise not sold for each owner divided by the total electricity available for disposition to ultimate consumers. Electricity lost or otherwise not sold includes:

(1) Energy furnished without charge;

(2) Energy used by the company;

(3) Transmission losses;

(4) Distribution losses; and

(5) Other unaccounted losses as reported to the Federal Government "Annual Report of Major Electric Utilities, Licensees and Others," Federal Energy Regulatory Commission (FERC) Form No.1; Rural Electrification Administration (REA) Forms 7 and 11 if appropriate; or the "Annual Electric Utility Report," Energy Information Administration (EIA) Form EIA–861.

h. The term *Total Electricity Available for Disposition to Ultimate Consumers* means the reporting year's total of all of a utility's electricity supply which is available for disposition, expressed in kilowatt hours, and is equal to the sum of the energy

sources minus the electricity sold for resale by the utility.

i. The term *Adjustment for Sales for Resale (ASR)* means the owner's fraction of sales for resale multiplied by the national average adjustment factor.

j. The term *Fraction of Sales for Resale (FSR)* means the owner's fractional quantity of electricity sold for resale by the utility relative to the total of electricity sales.

k. The term *National Average Adjustment Factor (NAF)* means the ratio of the national total of electricity sold to the national total of electricity available for disposition, based on the most recent 3 years of national data provided to the Federal Government, and will be set by the Contracting Officer. This term will be evaluated annually and revised in increments of .005.

l. Pumped storage losses. If the proportion of nuclear generated electricity consumed by a pumped-storage hydro facility can be measured or estimated and if the electricity losses associated with pumped storage facilities can be documented (e.g. based on routine and uniform records of district power data on contributions from different electricity sources), a prorated nuclear share shall be allowed as an offset to gross electricity generation reported on the annex A of appendix G, NWPA–830G form. Specific methodologies for calculating these offsets must be approved by the Contracting Officer in advance.

Instructions to annex A of appendix G, NWPA–830G provide the necessary information to calculate the energy adjustment factors.

14. The term *metric tons uranium* means that measure of weight, equivalent to 2,204.6 pounds of

uranium and other fissile and fertile material that are loaded into a reactor core as fresh fuel.

15. The term *Purchaser's site* means the location of Purchaser's civilian nuclear power reactor or such other location as the Purchaser may designate.

16. The term *quarterly Treasury rate* means the current value of funds rate as specified by the Treasury Fiscal Requirements Manual, Volume 1, Part 6, section 8020.20. This rate is published quarterly in the FEDERAL REGISTER prior to the beginning of the affected quarter.

17. The term *shipping lot* means a specified quantity of spent nuclear fuel or high-level radioactive waste designated by Purchaser for delivery to DOE beginning on a specified date.

18. The term *spent nuclear fuel* (SNF) means fuel that has been withdrawn from a nuclear reactor following irradiation, the consistituent elements of which have not been separated by reprocessing.

19. The term *spent nuclear fuel and high-level radioactive waste of domestic origin* means irradiated fuel material used, and radioactive wastes resulting from such use, in nuclear power reactors located only in the United States.

20. The term *year* means the period which begins on October 1 and ends on September 30.

ARTICLE II—SCOPE

This contract applies to the delivery by Purchaser to DOE of SNF and/or HLW of domestic origin from civilian nuclear power reactors, acceptance of title by DOE to such SNF and/or HLW, subsequent transportation, and disposal of such SNF and/or HLW and, with respect to such material, establishes the fees to be paid by the Purchaser for the services to be rendered hereunder by DOE. The SNF and/or HLW shall be specified in a delivery commitment schedule as provided in Article V below. The services to be provided by DOE under this contract shall begin, after commencement of facility operations, not later than January 31, 1998 and shall continue until such time as all SNF and/or HLW from the civilian nuclear power reactors specified in appendix A, annexed hereto and made a part hereof, has been disposed of.

ARTICLE III—TERM

The term of this contract shall be from the date of execution until such time as DOE has accepted, transported from the Purchaser's site(s) and disposed of all SNF and/or HLW of domestic origin from the civilian nuclear power reactor(s) specified in appendix A.

ARTICLE IV—RESPONSIBILITIES OF THE PARTIES

A. Purchaser's Responsibilities

1. *Discharge Information.*

(a) On an annual basis, commencing October 1, 1983, the Purchaser shall provide DOE with

information on actual discharges to date and projected discharges for the next ten (10) years in the form and content set forth in appendix B, annexed hereto and made a part hereof. The information to be provided will include estimates and projections and will not be Purchaser's firm commitment with respect to discharges or deliveries.

(b) No later than October 1, 1983, the Purchaser shall provide DOE with specific information on:

(1) Total spent nuclear fuel inventory as of April 7, 1983;

(2) Total number of fuel assemblies removed from the particular reactor core prior to 12:00 a.m. April 7, 1983 for which there are plans for reinsertion in the core, indicating the current planned dates for reinsertion in the core. Estimates of the burned and unburned portion of each individual assembly are to be provided.

(c) In the event that the Purchaser fails to provide the annual forecast in the form and content required by DOE, DOE may, in its sole discretion, require a rescheduling of any delivery commitment schedule then in effect.

2. *Preparation for Transportation.*

(a) The Purchaser shall arrange for, and provide, all preparation, packaging, required inspections, and loading activities necessary for the transportation of SNF and/or HLW to the DOE facility. The Purchaser shall notify DOE of such activities sixty (60) days prior to the commencement of such activities. The preparatory activities by the Purchaser shall be made in accordance with all applicable laws and regulations relating to the Purchaser's responsibilities hereunder. DOE may designate a representative to observe the

preparatory activities conducted by the Purchaser at the Purchaser's site, and the Purchaser shall afford access to such representative.

(b) Except as otherwise agreed to by DOE, the Purchaser shall advise DOE, in writing as specified in appendix F, annexed hereto and made a part hereof, as to the description of the material in each shipping lot sixty (60) days prior to scheduled DOE transportation of that shipping lot.

(c) The Purchaser shall be responsible for incidental maintenance, protection and preservation of any and all shipping casks furnished to the Purchaser by DOE for the performance of this contract. The Purchaser shall be liable for any loss of or damage to such DOE-furnished property, and for expenses incidental to such loss or damage while such casks are in the possession and control of the Purchaser except as otherwise provided for hereunder. Routine cask maintenance, such as scheduled overhauls, shall not be the responsibility of the Purchaser.

B. DOE Responsibilities

1. DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract.

2. DOE shall arrange for, and provide, a cask(s) and all necessary transportation of the SNF and/or HLW from the Purchaser's site to the DOE facility. Such cask(s) shall

be suitable for use at the Purchaser's site, meet applicable regulatory requirements, and be accompanied by pertinent information including, but not limited to, the following:

(a) Written procedures for cask handling and loading, including specifications on Purchaser-furnished cannisters for containment of failed fuel;

(b) Training for Purchaser's personnel in cask handling and loading, as may be necessary;

(c) Technical information, special tools, equipment, lifting trunnions, spare parts and consumables needed to use and perform incidental maintenance on the cask(s); and

(d) Sufficient documentation on the equipment supplied by DOE.

3. DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors.

4. DOE shall annually provide to the Purchaser pertinent information on the waste disposal program including information on cost projections, project plans and progress reports.

5. (a) Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of SNF and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

(b) Beginning not later than July 1, 1987, DOE shall issue an annual capacity report for planning purposes. This report shall set forth the projected annual receiving capacity for the DOE facility(ies) and the annual acceptance ranking relating to DOE contracts for the disposal of SNF and/or HLW including, to the extent available, capacity information for ten (10) years following the projected commencement of operation of the initial DOE facility.

ARTICLE V—DELIVERY OF SNF AND/OR HLW

A. Description of SNF and HLW

The Purchaser shall deliver to DOE and DOE shall, as provided in this contract, accept the SNF and/or HLW which is described in accordance with Article VI.A. of this contract, for disposal thereof.

B. Delivery Commitment Schedule

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and

request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (±) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.

C. Final Delivery Schedule

Final delivery schedule(s), in the form set forth in appendix D, annexed hereto and made a part hereof, for delivery of SNF and/or HLW covered by an approved delivery commitment schedule(s) shall be furnished to DOE by Purchaser. The Purchaser shall submit to DOE final delivery schedules not less than twelve (12) months prior to the delivery date specified therein. DOE shall approve or disapprove a final delivery schedule within forty-five (45) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser

in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s).

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; *provided, however,* that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however,* that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

ARTICLE VI—CRITERIA FOR DISPOSAL

A. General Requirements

1. *Criteria.*

(a) Except as otherwise provided in this contract, DOE shall accept hereunder only such SNF and/or HLW which meets the General Specifications for such fuel and waste as set forth in appendix E, annexed hereto and made a part hereof.

(b) Purchaser shall accurately classify SNF and/or HLW prior to delivery in accordance with paragraphs B and D of appendix E.

2. *Procedures.*

(a) Purchaser shall provide to DOE a detailed description of the SNF and/or HLW to be delivered hereunder in the form and content as set forth in appendix F, annexed hereto and made a part hereof. Purchaser shall promptly advise DOE of nay changes in said SNF and/or HLW as soon as they become known to the purchaser.

(b) DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

B. Acceptance Procedures

1. *Acceptance Priority Ranking.*

Delivery commitment schedules for SNF and/or HLW may require the disposal or more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

2. *Verification of SNF and/or HLW.*

During cask loading and prior to acceptance by DOE for transportation to the DOE facility, the SNF and/or HLW description of the shipping lot shall be subject to verification by DOE. To the extent the SNF and/or HLW is consistent with the description submitted and approved, in accordance with appendices E and F, DOE agrees to accept such SNF and/or HLW for disposal when DOE has verified the SNF and/or HLW description, determined the material is properly loaded, packaged, marked, labeled and ready for transportation, and has taken custody, as

evidenced in writing, of the material at the Purchaser's site, f.o.b. carrier. A properly executed off-site radioactive shipment record describing cask contents must be prepared by the Purchaser along with a signed certification which states: "This is to certify that the above-named materials are properly described, classified, packaged, marked and labeled and are in proper condition for transfer according to the applicable regulations of the U. S. Department of Transportation."

3. *Improperly described SNF and/or HLW.*

(a) *Prior to Acceptance*— If SNF and/or HLW is determined by DOE to be improperly described prior to acceptance by DOE at the Purchaser's site, DOE shall promptly notify the Purchaser in writing of such determination. DOE reserves the right, in its sole discretion, to refuse to accept such SNF and/or HLW until the SNF and/or HLW has been properly described. The Purchaser shall not transfer such SNF and/or HLW to DOE unless DOE agrees to accept such SNF and/or HLW under such other arrangements as may be agreed to, in writing, by the parties.

(b) *After Acceptance*— If subsequent to its acceptance DOE finds that such SNF and/or HLW is improperly described, DOE shall promptly notify the Purchaser, in writing, of such finding. In the event of such notification, Purchaser shall provide DOE with a proper designation within thirty (30) days. In the event of a failure by the Purchaser to provide such proper designation, DOE may hold in abeyance any and all deliveries scheduled hereunder.

ARTICLE VII—TITLE

Title to all SNF and/or HLW accepted by DOE for disposal shall pass to DOE at the Purchaser's site as provided for in Article VI hereof. DOE shall be solely repsonsible for control of all material upon passage of title. DOE shall have the right to dispose as it sees fit of any SNF and/or HLW to which it has taken title. The Purchaser shall have no claim against DOE or the Government with respect to such SNF or HLW nor shall DOE or the Government be obligated to compensate the Purchaser for such material.

ARTICLE VIII—FEES AND TERMS OF PAYMENT

A. Fees

1. Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) electricity generated and sold.

2. For SNF, or solidified high-level radioactive waste derived from SNF, which fuel was used to generate electricity in a civilian nuclear power reactor prior to April 7, 1983, a one-time fee will be assessed by applying industry-wide average dollar per kilogram charges to four (4) distinct ranges of fuel burnup so that the integrated cost across all discharged (i.e. spent) fuel is equivalent to an industry-wide average charge of 1.0 mill per kilowatt-hour. For purposes of this contract, discharged nuclear fuel is that fuel removed from the reactor core with no plans for reinsertion. In the event that any such fuel withdrawn with plans for reinsertion is not reinserted, then the applicable fee for such fuel shall be calculated as set

forth in this paragraph 2. The categories of spent nuclear fuel burnup and the fee schedule are listed below:

[In 1982 dollars]

Nuclear spent fuel burnup range	Dollars per kilogram
0 to 5,000 MWDT/MTU	$80.00
5,000 to 10,000 MWDT/MTU	142.00
10,000 to 20,000 MWDT/MTU	162.00
Over 20,000 MWDT/MTU	184.00

This fee shall not be subject to adjustment, and the payment thereof by the Purchaser shall be made to DOE as specified in paragraph B of this Article VIII.

3. For in-core fuel as of April 7, 1983, that portion of the fuel burned through April 6, 1983 shall be subject to the one-time fee as calculated in accordance with the following methodology: [a] determine the total weight in kilograms of unranium loaded initially in the particular core; [b] determine the total megawatt-days (thermal) which have been generated by all of the fuel assemblies in the said core as of 12:00 A.M. April 7, 1983; [c] divide the megawatt-days (thermal) generated in the said core by the total metric tons of initially loaded uranium in that core and multiply the quotient by the conversion factor 0.0078 to obtain a value in dollars per kilogram; and [d] multiply the

dollars per kilogram value by the kilograms determined in [a] above to derive the dollar charge for the one-time fee to be paid for the specified in-core fuel as of 12:00 A.M. April 7, 1983. For purposes of this contract, in-core fuel is that fuel in the reactor core as of the date specified, plus any fuel removed from the reactor with plans for reinsertion. That portion of such fuel unburned as of 12:00 A.M. April 7, 1983 shall be subject to the 1.0 mill per kilowatt-hour charge.

4. DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

B. Payment

1. For electricity generated and sold by the Purchaser's civilian nuclear power reactor(s) on or after April 7, 1983, fees shall be paid quarterly by the Purchaser and must be received by DOE not later than the close of the last business day of the month following the end of each assigned 3-month period. The first payment shall be due on July 31, 1983, for the period April 7, 1983, to June 30, 1983. (Add as applicable: A one-time adjustment period payment shall be due on _____, for the period _____ to _____.) The assigned 3-month period, for purposes of payment

and reporting of electricity generated and sold shall begin _____.

2. For SNF discharged prior to April 7, 1983, and for in-core burned fuel as of 12:00 A.M. April 7, 1983, the Purchaser shall, within two (2) years of contract execution, select one of the following fee payment options:

(a) *Option 1*— The Purchaser's financial obligation for said fuel shall be prorated evenly over forty (40) quarters and will consist of the fee plus interest on the outstanding fee balance. The interest from April 7, 1983, to date of the first payment is to be calculated based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period. Beginning with the first payment, interest is to be calculated on Purchaser's financial obligation plus accrued interest, at the ten-year Treasury note rate in effect on the date of the first payment. In no event shall the end of the forty (40) quarters extend beyond the first scheduled delivery date as reflected in the DOE-approved delivery commitment schedule. All payments shall be made concurrently with the assigned three month period payments. At any time prior to the end of the forty (40) quarters, Purchaser may, without penalty, make a full or partial lump sum payment at any of the assigned three month period payment dates. Subsequent quarterly payments will be appropriately reduced to reflect the reduction in the remaining balance in the fee due and payable. The remaining financial obligation, if any, will be subject

to interest at the same ten-year Treasury note rate over the remainder of the ten year period.

(b) *Option 2*— The Purchaser's financial obligation shall be paid in the form of a single payment anytime prior to the first delivery, as reflected in the DOE approved delivery commitment schedule, and shall consist of the fee plus interest on the outstanding fee balance. Interest is to be calculated from April 7, 1983, to the date of the payment based upon the 13-week Treasury bill rate, as reported on the first such issuance following April 7, 1983, and compounded quarterly thereafter by the 13-week Treasury bill rates as reported on the first such issuance of each succeeding assigned three-month period until payment.

(c) *Option 3*— The Purchaser's financial obligation shall be paid prior to June 30, 1985, or prior to two (2) years after contract execution, whichever comes later, in the form of a single payment and shall consist of all outstanding fees for SNF and in-core fuel burned prior to April 7, 1983. Under this option, no interest shall be due to DOE from April 7, 1983, to the date of full payment on the outstanding fee balance.

3. *Method of Payment:*

(a) Payments shall be made by wire transfer, in accordance with instructions specified by DOE in appendix G, annexed hereto and made a part hereof, and must be received within the time periods specified in paragraph B.1. of this Article VIII.

(b) The Purchaser will complete a Standard Remittance Advice, as set forth in appendix G, for each assigned three month period payment, and mail it postmarked no later than the last business day of the month following each assigned three month period to

Department of Energy, Office of Controller, Cash Management Division, Box 500, Room D–208, Germantown, Maryland 20874.

4. Any fees not paid on a timely basis or underpaid because of miscalculation will be subject to interest as specified in paragraph C of this Article VIII.

C. Interest on Late Fees

1. DOE will notify the Purchaser of amounts due only when unpaid or underpaid by the dates specified in paragraph B above. Interest will be levied according to the following formula:

Interest=Unpaid balance due to DOE for assigned three month period × Quarterly Treasury rate plus six percent (6%) × Number of months late including month of payment (fractions rounded up to whole months) ÷ 12

2. Interest is payable at any time prior to the due date for the subsequent assigned three month period fee payment. Nonpayment by the end of the subsequent assigned three month period will result in compounding of interest due. Purchaser shall complete a Standard Remittance Advice of interest payments.

3. Following the assessment of a late fee by DOE, payments will be applied against accrued interest first and the principal thereafter.

D. Effect of Payment

Upon payment of all applicable fees, interest and penalties on upaid or underpaid amounts, the Purchaser shall have no further financial obligation to DOE for the disposal of the accepted SNF and/or HLW.

E. Audit

1. The DOE or its representative shall have the right to perform any audits or inspections necessary to determine whether Purchaser is paying the correct amount under the fee schedule and interest provisions set forth in paragraphs A, B and C above.

2. Nothing in this contract shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

3. The Purchaser shall furnish DOE with such records, reports and data as may be necessary for the determination of quantities delivered hereunder and for final settlement of amounts due under this contract and shall retain and make available to DOE and its authorized representative examination at all reasonable times such records, reports and data for a period of three (3) years from the completion of delivery of all material under this contract.

ARTICLE IX—DELAYS

A. Unavoidable Delays by Purchaser or DOE

Neither the Government nor the Purchaser shall be liable under this contract for damages caused by

failure to perform its obligations hereunder, if such failure arises out of causes beyond the control and without the fault or negligence of the party failing to perform. In the event circumstances beyond the reasonable control of the Purchaser or DOE—such as acts of God, or of the public enemy, acts of Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes and unusually severe weather—cause delay in scheduled delivery, acceptance or transport of SNF and/or HLW, the party experiencing the delay will notify the other party as soon as possible after such delay is ascertained and the parties will readjust their schedules, as appropriate, to accommodate such delay.

B. Avoidable Delays by Purchaser or DOE

In the event of any delay in the delivery, acceptance or transport of SNF and/or HLW to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.

ARTICLE X—SUSPENSION

A. In addition to any other rights DOE may have hereunder, DOE reserves the right, at no cost to the Government, to suspend this contract or any portion thereof upon written notice to the Purchaser within ninety (90) days of the Purchaser's failure to perform its obligations hereunder, and the Purchaser's failure

to take corrective action within thirty (30) days after written notice of such failure to perform as provided above, unless such failure shall arise from causes beyond the control and without the fault or negligence of the Purchaser, its contractors or agents. However, the Purchaser's obligation to pay fees required hereunder shall continue unaffected by any suspension. Any such suspension shall be rescinded if and when DOE determines that Purchaser has completed corrective action.

B. The DOE reserves the right to suspend any scheduled deliveries in the event that a national emergency requires that priority be given to Government programs to the exclusion of the work under this contract. In the event of such a suspension by the Government, the DOE shall refund that portion of payments representing services not delivered as determined by the Contracting Officer to be an equitable adjustment. Any disagreement arising from the refund payment, if any, shall be resolved as provided in the clause of this contract, entitled "DISPUTES."

ARTICLE XI—REMEDIES

Nothing in this contract shall be construed to preclude either party from asserting its rights and remedies under the contract or at law.

ARTICLE XII—NOTICES

All notices and communications between the parties under this contract (except notices published in

the FEDERAL REGISTER) shall be in writing and shall be sent to the following addressees:

To DOE: _____

_____

_____

To the Purchaser: _____

_____

_____

However, the parties may change the addresses or addressees for such notices or communications without formal modification to this contract; *provided, however,* that notice of such changes shall be given by registered mail.

ARTICLE XIII—REPRESENTATION CONCERNING NUCLEAR HAZARDS INDEMNITY

A. DOE represents that it will include in its contract(s) for the operation of any DOE facility an indemnity agreement based upon Section 170(d) of the Atomic Energy Act of 1954, as amended, a copy of which agreement shall be furnished to the Purchaser; that under said agreement, DOE shall have agreed to indemnify the contractor and other persons indemnified against claims for public liability (as defined in said Act) arising out of or in connection with contractual activities; that the indemnity shall apply to covered nuclear incidents which (1) take place at a contract location; or (2) arise out of or in the course of transportation of source, special nuclear or by-product material to or from a contract location. The obligation

of DOE to indemnify shall be subject to the conditions stated in the indemnity agreement.

B. The provisions of this Article XIII shall continue beyond the term of this contract.

ARTICLE XIV—ASSIGNMENT

The rights and duties of the Purchaser may be assignable with transfer of title to the SNF and/or HLW involved; *provided, however,* that notice of any such transfer shall be made to DOE within ninety (90) days of transfer.

ARTICLE XV—AMENDMENTS

The provisions of this contract has been developed in the light of uncertainties necessarily attendant upon long-term contracts. Accordingly, at the request of either DOE or Purchaser, the parties will negotiate and, to the extent mutually agreed, amend this contract as the parties may deem to be necessary or proper to reflect their respective interests; *provided, however,* that any such amendment shall be consistent with the DOE final rule published in the FEDERAL REGISTER on April 18, 1983 entitled, "Standard Contract for Disposal or SNF and/or HLW", as the same may be amended from time to time.

ARTICLE XVI—DISPUTES

A. Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall

reduce his decision to writing and mail or otherwise furnish a copy thereof to the Purchaser. The decision of the Contracting Officer shall be final and conclusive unless within ninety (90) days from the date of receipt of such copy, the Purchaser mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the DOE Board of Contract Appeals (Board). The decision of the Board shall be final and conclusive unless determined by a court of competent jursidiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Purchaser shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

B. For Purchaser claims of more than $50,000, the Purchaser shall submit with the claim a certification that the claim is made in good faith; the supporting data are accurate and complete to the best of the Purchaser's knowledge and belief; and the amount requested accurately reflects the contract adjustment for which the Purchaser believes the Government is liable. The certification shall be executed by the Purchaser if an individual. When the Purchaser is not an individual, the certification shall be executed by a senior company official in charge at the Purchaser's plant or location involved, or by an officer or general partner of the Purchaser having overall responsibility for the conduct of the Purchaser's affairs.

C. For Purchaser claims of $50,000 or less, the Contracting Officer must render a decision within sixty (60) days. For Purchaser claims in excess of

$50,000, the Contracting Officer must decide the claim within sixty (60) days or notify the Purchaser of the date when the decision will be made.

D. This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph A above; *provided, however,* that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

ARTICLE XVII—OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE XVIII—COVENANT AGAINST CONTINGENT FEES

The Purchaser warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Purchaser for the purpose of securing business. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or in its discretion to increase the contract price or

consideration, or otherwise recover, the full amount of such commission, brokerage, or contingent fee.

ARTICLE XIX—EXAMINATION OF RECORDS

The Purchaser agrees that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any directly pertinent books, documents, papers and records of the Purchaser involving transactions related to this contract until the expiration of three years after final payment under this contract.

ARTICLE XX—PERMITS

The Government and the Purchaser shall procure all necessary permits or licenses (including any special nuclear material licenses) and comply with all applicable laws and regulations of the United States, States and municipalities necessary to execute their respective responsibilities and obligations under this contract.

ARTICLE XXI—RIGHTS IN TECHNICAL DATA

A. Definitions.

1. *Technical data* means recorded information regardless of form or characteristic, of a specific or technical nature. It may, for example, document research, experimental, developmental, or demonstration, or engineering work, or be usable or used to define a design or process, or to procure, produce, support, maintain or operate material. The

data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design-type documents or computer software (including computer programs, computer software data bases, and computer software documentation). Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and related information. Technical data as used herein do not include financial reports, cost analyses, and other information incidental to contract administration.

2. *Proprietary data* means technical data which embody trade secrets developed at private expense, such as design procedures or techniques, chemical composition of materials, or manufacturing methods, processes, or treatments, including minor modifications thereof, provided that such data:

(a) Are not generally known or available from other sources without obligation concerning their confidentiality;

(b) Have not been made available by the owner to others without obligation concerning its confidentiality; and

(c) Are not already available to the Government without obligation concerning their confidentiality.

3. *Contract data* means technical data first produced in the performance of the contract, technical data which are specified to be delivered under the contract, or technical data actually delivered in connection with the contract.

4. *Unlimited rights* means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to permit others to do so.

B. Allocation of Rights.

1. The Government shall have:

(a) Unlimited rights in contract data except as otherwise provided below with respect to proprietary data properly marked as authorized by this clause;

(b) The right to remove, cancel, correct or ignore any marking not authorized by the terms of this contract on any technical data furnished hereunder, if in response to a written inquiry by DOE concerning the proprietary nature of the markings, the Purchaser fails to respond thereto within 60 days or fails to substantiate the proprietary nature of the markings. In either case, DOE will notify the Purchaser of the action taken;

(c) No rights under this contract in any technical data which are not contract data.

2. Subject to the foregoing provisions of this rights in technical data clause, the Purchaser shall have the right to mark proprietary data it furnishes under the contract with the following legend and no other, the terms of which shall be binding on the Government:

LIMITED RIGHTS LEGEND

This "proprietary data," furnished under "Contract No. ___" with the U.S. Department of Energy may be duplicated and used by the Government with the express limitations that the "proprietary data" may

not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Purchaser, except that further disclosure or use may be made solely for the following purposes:

(a) This "proprietary data" may be disclosed for evaluation purposes under the restriction that the "proprietary data" be retained in confidence and not be further disclosed;

(b) This "proprietary data" may be disclosed to contractors participating in the Government's program of which this contract is a part, for information or use in connection with the work performed under their contracts and under the restriction that the "proprietary data" be retained in confidence and not be further disclosed; or

(c) This "proprietary data" may be used by the Government or others on its behalf for emergency work under the restriction that the "proprietary data" be retained in confidence and not be further disclosed. This legend shall be marked on any reproduction of this data in whole or in part.

3. In the event that proprietary data of a third party, with respect to which the Purchaser is subject to restrictions on use or disclosure, is furnished with the Limited Rights Legend above, Purchaser shall secure the agreement of such third party to the rights of the Government as set forth in the Limited Rights Legend. DOE shall upon request furnish the names of those contractors to which proprietary data has been disclosed.

ARTICLE XXII—ENTIRE CONTRACT

A. This contract, which consists of Articles I through XXII and appendices A through G, annexed hereto and made a part hereof, contains the entire agreement between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract.

B. Nothing in this contract is intended to affect in any way the contractual obligation of any other persons with whom the Purchaser may have contracted with respect to assuming some or all disposal costs or to accept title to SNF and/or HLW.

* * *

APPENDIX H

MICHIGAN PUBLIC SERVICE COMMISSION

Act 3 of 1939

AN ACT to provide for the regulation and control of public and certain private utilities and other services affected with a public interest within this state; to provide for alternative energy suppliers; to provide for licensing; to include municipally owned utilities and other providers of energy under certain provisions of this act; to create a public service commission and to prescribe and define its powers and duties; to abolish the Michigan public utilities commission and to confer the powers and duties vested by law on the public service commission; to provide for the continuance, transfer, and completion of certain matters and proceedings; to abolish automatic adjustment clauses; to prohibit certain rate increases without notice and hearing; to qualify residential energy conservation programs permitted under state law for certain federal exemption; to create a fund; to provide for a restructuring of the manner in which energy is provided in this state; to encourage the utilization of resource recovery facilities; to prohibit certain acts and practices of providers of energy; to allow for the securitization of stranded costs; to reduce rates; to provide for appeals; to provide appropriations; to declare the effect and purpose of this act; to prescribe remedies and penalties; and to repeal acts and parts of acts.

MICHIGAN PUBLIC SERVICE COMMISSION
(EXCERPT)
Act 3 of 1939

460.6 Public service commission; power and jurisdiction; "private, investor-owned wastewater utilities" defined.

Sec. 6. (1) The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in section 6d, and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities, including electric light and power companies, whether private, corporate, or cooperative; water, telegraph, oil, gas, and pipeline companies; motor carriers; private wastewater treatment facilities; and all public transportation and communication agencies other than railroads and railroad companies.

(2) A private, investor-owned wastewater utility may apply to the commission for rate regulation. If an application is filed under this subsection, the commission is vested with the specific grant of jurisdictional authority to regulate the rates, fares,

fees, and charges of private, investor-owned wastewater utilities. As used in this subsection, "private, investor-owned wastewater utilities" means a utility that delivers wastewater treatment services through a sewage system and the physical assets of which are wholly owned by an individual or group of individual shareholders.

460.6a Gas or electric utility; petition or application to increase rates and charges or to amend rate or rate schedules; notice and hearing; finding and order granting partial and immediate relief; investigation and report; increase in rates based upon changes in cost of fuel or purchased gas; automatic fuel or purchased gas adjustment clause; rules and procedures; adjustment clauses operating without notice and hearing abolished; separate hearing to determine cost of fuel, purchased gas, or purchased power; recovery of cost; "full and complete hearing" and "general rate case" defined; final decision; reports.

Sec. 6a. (1) When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable

opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. A finding or order shall not be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing. There shall be no increase in rates based upon changes in cost of fuel or purchased gas unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of fuel or purchased gas. The rates charged by any utility pursuant to an automatic fuel or purchased gas adjustment clause shall not be altered, changed, or amended unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of the fuel or purchased gas.

(2) The commission shall adopt rules and procedures for the filing, investigation, and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to petitions or applications within a period of 9 months from the filing of the petitions or applications. The commission shall not authorize or approve adjustment clauses that operate without notice and an opportunity for a full and complete hearing, and all such clauses shall be abolished. The

commission may hold a full and complete hearing to determine the cost of fuel, purchased gas, or purchased power separately from a full and complete hearing on general rate case and may be held concurrently with the general rate case. The commission shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent. As used in this section:

(a) "Full and complete hearing" means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing.

(b) "General rate case" means a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service.

(3) If a final decision has not been reached upon a petition or application to increase or decrease utility rates within the 9-month period required by subsection (2), the commission shall give priority to the case and shall take such other action as it finds necessary or appropriate to expedite a final decision. If the commission fails to reach a final decision with respect to a petition or application to increase or decrease utility rates within the 9-month period following the filing of the petition or application, the commission, within 15 days after expiration of the 9-month period, shall submit a written report to the governor and to the president of the senate and the speaker of the house of representatives stating the reasons a decision

was not reached within the 9-month period and the actions being taken to expedite the decision. The commission shall submit a further report upon reaching a final decision providing full details with respect to the conduct of the case, including the time required for issuance of the commission's decision following the conclusion of hearings.

460.6j Incorporation of power supply cost recovery clause in electric rates or rate schedule of utility; definitions; order and hearing; filing power supply cost recovery plan and 5-year forecast; power supply and cost review; final or temporary order; incorporating power supply cost recovery factors in rates; filing revised power supply cost recovery plan; reopening power supply and cost review; monthly statement of revenues; power supply cost reconciliation; commission order; refunds or credits or additional charges to customers; apportionment; interest; exemption; setting power supply cost recovery factors in general rate case order.

Sec. 6j. (1) As used in this act:

(a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

(b) "Power supply cost recovery factor" means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility.

(2) Pursuant to its authority under this act, the public service commission may incorporate a power supply cost recovery clause in the electric rates or rate schedule of a utility, but is not required to do so. Any order incorporating a power supply cost recovery clause shall be as a result of a hearing solely on the question of the inclusion of the clause in the rates or rate schedule, which hearing shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, or, pursuant to subsection (18), as a result of a general rate case. Any order incorporating a power supply cost recovery clause shall replace and rescind any previous fuel cost adjustment clause or purchased and net interchanged power adjustment clause incorporated in the electric rates of the utility upon the effective date of the first power supply cost recovery factor authorized for the utility under its power supply cost recovery clause.

(3) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility annually shall file, pursuant to procedures established by the commission, if any, a complete power supply cost recovery plan describing the expected sources of electric power supply and changes in the cost of power supply anticipated over a future

12-month period specified by the commission and requesting for each of those 12 months a specific power supply cost recovery factor. The plan shall be filed not less than 3 months before the beginning of the 12-month period covered by the plan. The plan shall describe all major contracts and power supply arrangements entered into by the utility for providing power supply during the specified 12-month period. The description of the major contracts and arrangements shall include the price of fuel, the duration of the contract or arrangement, and an explanation or description of any other term or provision as required by the commission. The plan shall also include the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility.

(4) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility shall file, contemporaneously with the power supply cost recovery plan required by subsection (3), a 5-year forecast of the power supply requirements of its customers, its anticipated sources of supply, and projections of power supply costs, in light of its existing sources of electrical generation and sources of electrical generation under construction. The forecast shall include a description of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, and such other information as the commission may require.

(5) If a utility files a power supply cost recovery plan and a 5-year forecast as provided in subsections (3) and (4), the commission shall conduct a proceeding, to be known as a power supply and cost review, for the purpose of evaluating the reasonableness and prudence of the power supply cost recovery plan filed by a utility pursuant to subsection (3), and establishing the power supply cost recovery factors to implement a power supply cost recovery clause incorporated in the electric rates or rate schedule of the utility. The power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969.

(6) In its final order in a power supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan filed by the utility pursuant to subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly. In evaluating the decisions underlying the power supply cost recovery plan, the commission shall consider the cost and availability of the electrical generation available to the utility; the cost of short-term firm purchases available to the utility; the availability of interruptible service; the ability of the utility to reduce or to eliminate any firm sales to out-of-state customers if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority; whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors. The commission shall approve, reject, or amend the 12 monthly power supply cost recovery factors requested by the utility in its power

supply cost recovery plan. The factors shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13). The factors ordered shall be described in fixed dollar amounts per unit of electricity, but may include specific amounts contingent on future events.

(7) In its final order in a power supply and cost review, the commission shall evaluate the decisions underlying the 5-year forecast filed by a utility pursuant to subsection (4). The commission may also indicate any cost items in the 5-year forecast that, on the basis of present evidence, the commission would be unlikely to permit the utility to recover from its customers in rates, rate schedules, or power supply cost recovery factors established in the future.

(8) The commission, on its own motion or the motion of any party, may make a finding and enter a temporary order granting approval or partial approval of a power supply cost recovery plan in a power supply and cost recovery review, after first having given notice to the parties to the review, and after having afforded to the parties to the review a reasonable opportunity for a full and complete hearing. A temporary order made pursuant to this subsection shall be considered a final order for purposes of judicial review.

(9) If the commission has made a final or temporary order in a power supply and cost review, the utility may each month incorporate in its rates for the period covered by the order any amounts up to the power supply cost recovery factors permitted in that order. If the commission has not made a final or temporary

order within 3 months of the submission of a complete power supply cost recovery plan, or by the beginning of the period covered in the plan, whichever comes later, or if a temporary order has expired without being extended or replaced, then pending an order which determines the power supply cost recovery factors, a utility may each month adjust its rates to incorporate all or a part of the power supply cost recovery factors requested in its plan. Any amounts collected under the power supply cost recovery factors before the commission makes its final order shall be subject to prompt refund with interest to the extent that the total amounts collected exceed the total amounts determined in the commission's final order to be reasonable and prudent for the same period of time.

(10) Not less than 3 months before the beginning of the third quarter of the 12-month period, the utility may file a revised power supply cost recovery plan which shall cover the remainder of the 12-month period. Upon receipt of the revised power supply cost recovery plan, the commission shall reopen the power supply and cost review. In addition, the commission may reopen the power supply and cost review on its own motion or on the showing of good cause by any party if at least 6 months have elapsed since the utility submitted its complete filing and if there are at least 60 days remaining in the 12-month period under consideration. A reopened power supply and cost review shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, and in accordance with subsections (3), (6), (8), and (9).

(11) Not more than 45 days following the last day of each billing month in which a power supply cost recovery factor has been applied to customers' bills, the utility shall file with the commission a detailed statement for that month of the revenues recorded pursuant to the power supply cost recovery factor and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility, and the cost of power supply. The detailed statement shall be in the manner and form prescribed by the commission. The commission shall establish procedures for insuring that the detailed statement is promptly verified and corrected if necessary.

(12) Not less than once a year, and not later than 3 months after the end of the 12-month period covered by a utility's power supply cost recovery plan, the commission shall commence a proceeding, to be known as a power supply cost reconciliation, as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. Reasonable discovery shall be permitted before and during the reconciliation proceeding in order to assist parties and interested persons in obtaining evidence concerning reconciliation issues including, but not limited to, the reasonableness and prudence of expenditures and the amounts collected pursuant to the clause. At the power supply cost reconciliation the commission shall reconcile the revenues recorded pursuant to the power supply cost recovery factors and the allowance for cost of power supply included in the base rates established in the latest commission order for the utility with the amounts actually expensed and included in the cost of

power supply by the utility. The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged if the issue was not considered adequately at a previously conducted power supply and cost review.

(13) In its order in a power supply cost reconciliation, the commission shall:

(a) Disallow cost increases resulting from changes in accounting or rate-making expense treatment not previously approved by the commission. The commission may order the utility to pay a penalty not to exceed 25% of the amount improperly collected. Costs incurred by the utility for penalty payments shall not be charged to customers.

(b) Disallow any capacity charges associated with power purchased for periods in excess of 6 months unless the utility has obtained the prior approval of the commission. If the commission has approved capacity charges in a contract with a qualifying facility, as defined by the federal energy regulatory commission pursuant to the public utilities regulatory policies act of 1978, Public Law 95-617, 92 Stat. 3117, the commission shall not disallow the capacity charges for the facility in the power supply cost reconciliation unless the commission has ordered revised capacity charges upon reconsideration pursuant to this subsection. A contract shall be valid and binding in accordance with its terms and capacity charges paid pursuant to such a contract shall be recoverable costs of the utility for rate-making purposes notwithstanding that the order approving such a contract is later vacated, modified, or otherwise held to be invalid in whole or in part if the order approving the contract has not been stayed or suspended by a

competent court within 30 days after the date of the order, or within 30 days of the effective date of the 1987 amendatory act that added subsection (19) if the order was issued after September 1, 1986, and before the effective date of the 1987 amendatory act that added subsection (19). The scope and manner of the review of capacity charges for a qualifying facility shall be determined by the commission. Except as to approvals for qualifying facilities granted by the commission prior to June 1, 1987, proceedings before the commission seeking such approvals shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969. The commission, upon its own motion or upon application of any person, may reconsider its approval of capacity charges in a contested case hearing after passage of a period necessary for financing the qualifying facility, provided that:

(i) The commission has first issued an order making a finding based on evidence presented in a contested case that there has been a substantial change in circumstances since the commission's initial approval; and

(ii) Such a commission finding shall be set forth in a commission order subject to immediate judicial review.

The financing period for a qualifying facility during which previously approved capacity charges shall not be subject to commission reconsideration shall be 17.5 years, beginning with the date of commercial operation, for all qualifying facilities, except that the minimum financing period before reconsideration of the previously approved capacity charges shall be for

the duration of the financing for a qualifying facility which produces electric energy by the use of biomass, waste, wood, hydroelectric, wind, and other renewable resources, or any combination of renewable resources, as the primary energy source.

(c) Disallow net increased costs attributable to a generating plant outage of more than 90 days in duration unless the utility demonstrates by clear and satisfactory evidence that the outage, or any part of the outage, was not caused or prolonged by the utility's negligence or by unreasonable or imprudent management.

(d) Disallow transportation costs attributable to capital investments to develop a utility's capability to transport fuel or relocate fuel at the utility's facilities and disallow unloading and handling expenses incurred after receipt of fuel by the utility.

(e) Disallow the cost of fuel purchased from an affiliated company to the extent that such fuel is more costly than fuel of requisite quality available at or about the same time from other suppliers with whom it would be comparably cost beneficial to deal.

(f) Disallow charges unreasonably or imprudently incurred for fuel not taken.

(g) Disallow additional costs resulting from unreasonably or imprudently renegotiated fuel contracts.

(h) Disallow penalty charges unreasonably or imprudently incurred.

(i) Disallow demurrage charges.

(j) Disallow increases in charges for nuclear fuel disposal unless the utility has received the prior approval of the commission.

(14) In its order in a power supply cost reconciliation, the commission shall require a utility to refund to customers or credit to customers' bills any net amount determined to have been recovered over the period covered in excess of the amounts determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. Such refunds or credits shall be apportioned among the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order refunds or credits in proportion to the excess amounts actually collected from each such customer during the period covered.

(15) In its order in a power supply cost reconciliation, the commission shall authorize a utility to recover from customers any net amount by which the amount determined to have been recovered over the period covered was less than the amount determined to have been actually expensed by the utility for power supply, and to have been incurred through reasonable and prudent actions not precluded by the commission order in the power supply and cost review. For excess costs incurred through management actions contrary to the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates by clear and convincing evidence that the excess expenses were

beyond the ability of the utility to control through reasonable and prudent actions. For excess costs incurred through management actions consistent with the commission's power supply and cost review order, the commission shall authorize a utility to recover costs incurred for power supply in the reconciliation period in excess of the amount recovered over the period only if the utility demonstrates that the level of such expenses resulted from reasonable and prudent management actions. Such amounts in excess of the amounts actually recovered by the utility for power supply shall be apportioned among and charged to the customers of the utility utilizing procedures that the commission determines to be reasonable. The commission may adopt different procedures with respect to customers served under the various rate schedules of the utility and may, in appropriate circumstances, order charges to be made in proportion to the amounts which would have been paid by such customers if the amounts in excess of the amounts actually recovered by the utility for cost of power supply had been included in the power supply cost recovery factors with respect to such customers during the period covered. Charges for such excess amounts shall be spread over a period that the commission determines to be appropriate.

(16) If the commission orders refunds or credits pursuant to subsection (14), or additional charges to customers pursuant to subsection (15), in its final order in a power supply cost reconciliation, the refunds, credits, or additional charges shall include interest. In determining the interest included in a refund, credit, or additional charge pursuant to this subsection, the commission shall consider, to the

extent material and practicable, the time at which the excess recoveries or insufficient recoveries, or both occurred. The commission shall determine a rate of interest for excess recoveries, refunds, and credits equal to the greater of the average short-term borrowing rate available to the utility during the appropriate period, or the authorized rate of return on the common stock of the utility during that same period. Costs incurred by the utility for refunds and interest on refunds shall not be charged to customers. The commission shall determine a rate of interest for insufficient recoveries and additional charges equal to the average short-term borrowing rate available to the utility during the appropriate period.

(17) To avoid undue hardship or unduly burdensome or excessive cost, the commission may:

(a) Exempt an electric utility with fewer than 200,000 customers in the state of Michigan from 1 or more of the procedural provisions of this section or may modify the filing requirements of this section.

(b) Exempt an energy utility organized as a cooperative corporation pursuant to sections 98 to 109 of Act No. 327 of the Public Acts of 1931, being sections 450.98 to 450.109 of the Michigan Compiled Laws, from 1 or more of the provisions of this section.

(18) Notwithstanding any other provision of this act, the commission may, upon application by an electric utility, set power supply cost recovery factors, in a manner otherwise consistent with this act, in an order resulting from a general rate case. Within 120 days following the effective date of this section, for the purpose of setting power supply cost recovery factors, the commission shall permit an electric utility to

reopen a general rate case in which a final order was issued within 120 days before or after the effective date of this section or to amend an application or reopen the evidentiary record in a pending general rate case. If the commission sets power supply cost recovery factors in an order resulting from a general rate case:

(a) The power supply cost recovery factors shall cover a future period of 48 months or the number of months which elapse until the commission orders new power supply cost recovery factors in a general rate case, whichever is the shorter period.

(b) Annual reconciliation proceedings shall be conducted pursuant to subsection (12) and if an annual reconciliation proceeding shows a recoverable amount pursuant to subsection (15), the commission shall authorize the electric utility to defer the amount and to accumulate interest on the amount pursuant to subsection (16), and in the next order resulting from a general rate case authorize the utility to recover the amount and interest from its customers in the manner provided in subsection (15).

(c) The power supply cost recovery factors shall not be subject to revision pursuant to subsection (10).

(19) Five years after the effective date of the amendatory act that added this subsection, and every 5 years thereafter, the standing committees of the house and senate that deal with public utilities shall review the amendatory act that added this subsection.

460.6k Initial power supply cost recovery plan; filing; alteration of rate schedule in accordance with adjustment clause; charges in excess of base rate; revenues subject to existing

reconciliation proceedings; revenues resulting from certain adjustment clauses subject to existing reconciliation proceedings; revenues subject to annual reconciliation; procedures; lag correction provision; adjustment of rates pending approval or disapproval of power supply cost recovery clause.

Sec. 6k. (1) This section shall govern the initial filing and implementation of a power supply cost recovery plan under section 6j(3).

(2) The initial power supply cost recovery plan may be for a period of less than 12 months and shall be filed:

(a) By an electric utility subject to commission rate jurisdiction with at least 200,000 residential customers in the state of Michigan, within 4 months after the effective date of this section.

(b) By all other electric utilities subject to commission rate jurisdiction, within 15 months after the effective date of this section in accordance with the provisions of this act which the commission determines to be appropriate for the individual utility.

(3) Notwithstanding section 6a(3), until the expiration of 3 months plus the remainder of the then current billing month following the last day on which a utility is required to file its first power supply cost recovery plan pursuant to subsection (2) of this section, the utility may alter its rate schedule in accordance with an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause. Thereafter, the utility may make charges in excess of base rates for the cost of power supply

pursuant only to subsections (2) and (4) of this section. After the effective date of this section, any revenues resulting from an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause and recorded for an annual reconciliation period ending prior to January 1, 1983, by an electric utility shall be subject to the existing reconciliation proceeding established by the commission for the utility. In this proceeding, the commission shall consider the reasonableness and prudence of expenditures charged pursuant to an existing fuel cost adjustment clause or purchased and net interchanged power adjustment clause after the effective date of this section. On and after January 1, 1983, all fuel cost and purchased and net interchanged power revenues received by an electric utility, whether included in base rates or collected pursuant to a fuel or purchased and net interchanged power adjustment clause or a power supply cost recovery clause, shall be subject to annual reconciliation with the cost of fuel and purchased and net interchanged power. Such annual reconciliations shall be conducted in accordance with the reconciliation procedures described in section 6j(12) to (18), including the provisions for refunds, additional charges, deferral and recovery, and shall include consideration by the commission of the reasonableness and prudence of expenditures charged pursuant to any fuel or purchased and net interchanged power adjustment clause in existence during the period being reconciled. If the utility has a lag correction provision included in its existing adjustment clauses, the commission shall allow any adjustment to rates attributable to such lag correction provision to be implemented for the 3 billing months

immediately succeeding the final billing month in which the existing adjustment clauses as operative.

(4) Until the commission approves or disapproves a power supply cost recovery clause in a final commission order in a contested case required by section 6j(2), a utility which had a fuel cost adjustment clause or purchased and net interchanged power adjustment clause on the effective date of this section and which has applied for a power supply cost recovery clause under section 6j may adjust its rates pursuant to section 6j(3) to (18), to include power supply cost recovery factors.

460.6l Insuring equitable representation of interests of energy utility customers; definitions; utility consumer participation board; creation; powers and duties; number and appointment of members; "utility" defined; member requirements; terms; vacancy; removal of member; meetings; quorum; election of chairperson and vice-chairperson; conducting business of board at public meeting; public notice; availability of writings to public; expense reimbursement and remuneration; limits; temporary administrator of fund.

Sec. 6l. (1) For purposes of implementing sections 6h, 6i, 6j, and 6k, this section and section 6m shall provide means of insuring equitable representation of the interests of energy utility customers.

(2) As used in this section and section 6m:

(a) "Annual receipts" means the payments received by the fund under section 6m(2)(a) and (b) during a calendar year.

(b) "Board" means the utility consumer participation board created under subsection (3).

(c) "Department" means the department of management and budget.

(d) "Energy cost recovery proceeding" means any proceeding to establish or implement a gas cost recovery clause or a power supply cost recovery clause as provided in sections 6h, 6i, 6j, or 6k, to set gas cost recovery factors pursuant to section 6h(17), or to set power supply cost recovery factors pursuant to section 6j(18).

(e) "Energy utility" means each electric or gas company regulated by the public service commission.

(f) "Fund" means the utility consumer representation fund created in section 6m.

(g) "Household" means a single-family home, duplex, mobile home, seasonal dwelling, farm home, cooperative, condominium, or apartment which has normal household facilities such as a bathroom, individual cooking facilities, and kitchen sink facilities. Household does not include a penal or corrective institution, or a motel, hotel, or other similar structure if used as a transient dwelling.

(h) "Jurisdictional" means subject to rate regulation by the Michigan public service commission.

(i) "Net grant proceeds" means the annual receipts of the fund less the amounts reserved for the attorney general's use and the amounts expended for board expenses and operation.

(j) "Residential energy utility consumer" or "consumer" means a customer of an energy utility who receives utility service for use within an individual

household or an improvement reasonably appurtenant to and normally associated with an individual household.

(k) "Residential tariff sales" means those sales by an energy utility which are subject to residential tariffs on file with the commission.

(l) "Utility consuming industry" means a person, sole proprietorship, partnership, association, corporation, or other entity which receives utility service ordinarily and primarily for use in connection with the manufacture, sale, or distribution of goods or the provision of services, but does not include a nonprofit organization representing residential utility customers.

(3) The utility consumer participation board is created within the department and shall exercise its powers and duties under this act independently of the department. The procurement and related management functions of the commission shall be performed under the direction and supervision of the department. The board shall consist of 5 members appointed by the governor, 1 of whom shall be chosen from 1 or more lists of qualified persons submitted by the attorney general.

(4) For the purposes of subsection (5) only, "utility" means an electric or gas company located in or outside of this state.

(5) Each member of the board shall meet the following requirements:

(a) Shall be an advocate for the interests of residential utility consumers, as demonstrated by the member's knowledge of and support for consumer

interests and concerns in general or specifically related to utility matters.

(b) Shall not be, or shall not have been within the 5 years preceding appointment, a member of a governing body of, or employed in a managerial or professional or consulting capacity by a utility or an association representing utilities; an enterprise or professional practice which received over $1,500.00 in the year preceding the appointment as a supplier of goods or services to a utility or association representing utilities; or an organization representing employees of such a utility, association, enterprise, or professional practice, or an association which represents such an organization.

(c) Shall not have, or shall not have had within 1 year preceding appointment, a financial interest exceeding $1,500.00 in a utility, an association representing utilities, or an enterprise or professional practice which received over $1,500.00 in the year preceding the appointment as a supplier of goods or services to a utility or association representing utilities.

(d) Shall not be an officer or director of an applicant for a grant under section 6m.

(e) Shall not be a member of the immediate family of a person who would be ineligible under subdivisions (a), (b), (c), or (d).

(6) The members of the board shall be appointed for 2-year terms beginning with the first day of a legislative session in an odd-numbered year and ending on the day before the first day of the legislative session in the next odd-numbered year or when the members' successors are appointed, whichever occurs later. The governor shall not appoint a member to the

board for a term commencing after the governor's term of office has ended. A vacancy shall be filled in the same manner as the original appointment. If the vacancy is created other than by expiration of a term, the member shall be appointed for the balance of the unexpired term of the member to be succeeded.

(7) The governor shall remove a member of the board if that member is absent for any reason from either 3 consecutive board meetings or more than 50% of the meetings held by the board in a calendar year. However, a person who is removed due to absenteeism is eligible for reappointment to fill a vacancy which occurs in the board membership. The governor also shall remove a member of the board if the member is subsequently determined to be ineligible under subsection (5).

(8) The board shall hold bimonthly meetings and additional meetings as necessary. A quorum consists of 3 members. A majority vote of the members appointed and serving is necessary for a decision. At its first meeting following the appointment of new members, or as soon as possible after the first meeting, the board shall elect biennially from its membership a chairperson and a vice-chairperson.

(9) The board shall not act directly to represent the interests of residential utility consumers except through administration of the fund and grant program under this section.

(10) The business which the board may perform shall be conducted at a public meeting of the board held in compliance with the open meetings act, Act No.

267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

(11) A writing prepared, owned, used, in the possession of, or retained by the board in the performance of an official function shall be made available to the public in compliance with the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

(12) A member of the board may be reimbursed for actual and necessary expenses, including travel expenses to and from each meeting held by the board, incurred in discharging the member's duties under this section and section 6m. In addition to expense reimbursement, a board member may receive remuneration from the board of $100.00 per meeting attended, not to exceed $1,000.00 in a calendar year. These limits shall be adjusted proportionately to an adjustment in the remittance amounts under section 6m(4) to allow for changes in the cost of living.

(13) Until the board certifies that it is operating and ready to perform all duties under this act, the director of the energy administration created by executive directives 1976-2 and 1976-5 shall serve as temporary administrator of the fund and exercise all duties and powers of the board.

460.6m Utility consumer representation fund; creation as special fund; investment and release of money; remittances by energy utility; factor; action for recovery of disputed amount; action on application for energy cost recovery proceedings; conditions; acceptance of gift or grant; payment of operating costs and expenses; net grant proceeds to finance grant program; application; form; consideration; encouraging representation of different consumer interests; criteria; inviting applicants to file jointly and awarding grant to be managed cooperatively; disbursements; notice of availability of fund; use of annual receipts and interest; retention of certain amounts; conditions applicable to grants; reports; reviewing relationship between costs and benefits.

Sec. 6m. (1) The utility consumer representation fund is created as a special fund. The state treasurer shall be the custodian of the fund and shall maintain a separate account of the money in the fund. The money in the fund shall be invested in the bonds, notes, and other evidences of indebtedness issued or insured by the United States government and its agencies, and in prime commercial paper. The state treasurer shall release money from the fund, including interest earned, in the manner and at the time directed by the board.

(2) Except as provided in subsection (6), each energy utility which has applied to the public service commission for the initiation of an energy cost recovery proceeding shall remit to the fund prior to or upon filing its initial application for such a proceeding, and

on or before the first anniversary of that application, an amount of money determined by the board in the following manner:

(a) In the case of an energy utility company serving at least 100,000 customers in this state, an amount which bears to $300,000.00, multiplied by a factor as provided in subsection (4), the same proportion as the company's jurisdictional 1981 total operating revenues, as stated in its annual report, bear to the jurisdictional 1981 total operating revenues of all energy utility companies serving at least 100,000 customers in this state. This amount shall be made available by the board for use by the attorney general for the purposes described in subsection (17).

(b) In the case of an energy utility company serving at least 100,000 residential customers in this state, an amount which bears to $300,000.00, multiplied by a factor as provided in subsection (4), the same proportion as the company's jurisdictional 1981 gross revenues from residential tariff sales bear to the jurisdictional 1981 gross revenues from residential tariff sales of all energy utility companies serving at least 100,000 residential customers in this state. This amount shall be used for grants under subsection (11).

(3) Payments made by an energy utility under subsection (2)(a) shall be operating expenses of the utility which the public service commission shall permit the utility to charge to its customers. Payments made by a utility under subsection (2)(b) shall be operating expenses of the utility which the public service commission shall permit the utility to charge to its residential customers.

(4) For purposes of subsection (2), the factor shall be set by the board at a level not to exceed the percentage increase in the index known as the consumer price index for urban wage earners and clerical workers, select areas, all items indexed, for the Detroit standard metropolitan statistical area, compiled by the bureau of labor statistics of the United States department of labor, or any successor agency, which has occurred between January 1981 and January of the year in which the payment is required to be made. In the event that more than 1 such index is compiled, the index yielding the largest payment shall be the maximum allowable factor. The board shall advise utilities of the factor.

(5) On or before the second and succeeding anniversaries of its initial application for an energy cost recovery proceeding, an energy utility shall remit to the board amounts equal to 5/6 of the amounts required under subsection (2).

(6) The remittance requirements of this section shall not apply to an energy utility organized as a cooperative corporation pursuant to sections 98 to 109 of Act No. 327 of the Public Acts of 1931, being sections 450.98 to 450.109 of the Michigan Compiled Laws, and grants from the fund shall not be used to participate in an energy cost recovery proceeding primarily affecting such a utility.

(7) In the event of a dispute between the board and an energy utility about the amount of payment due, the utility shall pay the undisputed amount and, if the utility and the board cannot agree, the board may initiate civil action in the circuit court for Ingham

county for recovery of the disputed amount. The commission shall not accept or take action on an application for an energy cost recovery proceeding from an energy utility subject to this section which has not fully paid undisputed remittances required by this section.

(8) The commission shall not accept or take action on an application for an energy cost recovery proceeding from an energy utility subject to this section until 30 days after it has been notified by the board or the director of the energy administration, if section 6*l*(13) is applicable, that the board or the director is ready to process grant applications, will transfer funds payable to the attorney general immediately upon the receipt of such funds, and will within 30 days approve grants and remit funds to qualified grant applicants.

(9) The board may accept a gift or grant from any source to be deposited in the fund if the conditions or purposes of the gift or grant are consistent with this section.

(10) The costs of operation and expenses incurred by the board in performing its duties under this section and section 6l, including remuneration to board members, shall be paid from the fund. A maximum of 5% of the annual receipts of the fund may be budgeted and used to pay expenses other than grants made under subsection (11).

(11) The net grant proceeds shall finance a grant program from which the board may award to an

applicant an amount which the board determines shall be used for the purposes set forth in this section.

(12) The board shall create and make available to applicants an application form. Each applicant shall indicate on the application how the applicant meets the eligibility requirements provided for in this section and how the applicant proposes to use a grant from the fund to participate in 1 or more proceedings as authorized in subsection (17) which have been or are expected to be filed. The board shall receive an application requesting a grant from the fund only from a nonprofit organization or a unit of local government in this state. The board shall consider only applications for grants containing proposals which are in keeping with subsections (17) and (18) and which serve the interests of residential utility consumers. For purposes of making grants, the board may consider protection of the environment, energy conservation, the creation of employment and a healthy economy in the state, and the maintenance of adequate energy resources. The board shall not consider an application which primarily benefits the applicant or a service provided or administered by the applicant. The board shall not consider an application from a nonprofit organization if 1 of the organization's principal interests or unifying principles is the welfare of a utility or its investors or employees, or the welfare of 1 or more businesses or industries, other than farms not owned or operated by a corporation, which receive utility service ordinarily and primarily for use in connection with the profit-seeking manufacture, sale, or distribution of goods or services. Mere ownership of securities by a nonprofit organization or its members

shall not disqualify an application submitted by that organization.

(13) The board shall encourage the representation of the interests of identifiable types of residential utility consumers whose interests may differ, including various social and economic classes and areas of the state, and if necessary, may make grants to more than 1 applicant whose applications are related to a similar issue to achieve this type of representation. In addition, the board shall consider and balance the following criteria in determining whether to make a grant to an applicant:

(a) Evidence of the applicant's competence, experience, and commitment to advancing the interests of residential utility consumers.

(b) In the case of a nongovernmental applicant, the extent to which the applicant is representative of or has a previous history of advocating the interests of citizens, especially residential utility consumers.

(c) The anticipated effect of the proposal contained in the application on residential utility consumers, including the immediate and long-term impacts of the proposal.

(d) Evidence demonstrating the potential for continuity of effort and the development of expertise in relation to the proposal contained in the application.

(e) The uniqueness or innovativeness of an applicant's position or point of view, and the probability and desirability of that position or point of view prevailing.

(14) As an alternative to choosing between 2 or more applications which have similar proposals, the

board may invite 2 or more of the applicants to file jointly and award a grant to be managed cooperatively.

(15) The board shall make disbursements pursuant to a grant in advance of an applicant's proposed actions as set forth in the application if necessary to enable the applicant to initiate, continue, or complete the proposed actions.

(16) Any notice to utility customers and the general public of hearings or other state proceedings in which grants from the fund may be used shall contain a notice of the availability of the fund and the address of the board.

(17) The annual receipts and interest earned, less administrative costs, may be used only for participation in administrative and judicial proceedings under sections 6h, 6i, 6j, and 6k, and in federal administrative and judicial proceedings which directly affect the energy costs paid by Michigan energy utilities. Amounts which have been in the fund more than 12 months may be retained in the fund for future grants, or may be returned to energy utility companies or used to offset their future remittances in proportion to their previous remittances to the fund, as the board determines will best serve the interests of consumers.

(18) The following conditions shall apply to all grants from the fund:

(a) Disbursements from the fund may be used only to advocate the interests of energy utility customers or classes of energy utility customers, and not for representation of merely individual interests.

(b) The board shall attempt to maintain a reasonable relationship between the payments from a particular energy utility and the benefits to consumers of that utility.

(c) The board shall coordinate the funded activities of grant recipients with those of the attorney general to avoid duplication of effort, to promote supplementation of effort, and to maximize the number of hearings and proceedings with intervenor participation.

(19) A recipient of a grant pursuant to subsection (11) may use the grant only for the advancement of the proposed action approved by the board, including, but not limited to, costs of staff, hired consultants and counsel, and research.

(20) A recipient of a grant under subsection (11) shall file a report with the board within 90 days following the end of the year or a shorter period for which the grant is made. The report shall be made in a form prescribed by the board and shall be subject to audit by the board. The report shall include the following information:

(a) An account of all grant expenditures made by the grant recipient. Expenditures shall be reported within the following categories:

(i) Employee and contract for services costs.

(ii) Costs of materials and supplies.

(iii) Filing fees and other costs required to effectively represent residential utility consumers as provided in this section.

(b) Any additional information concerning uses of the grant required by the board.

(21) The attorney general shall file a report with the house and senate committees on appropriations within 90 days following the end of each fiscal year. The report shall include the following information:

(a) An account of all expenditures made by the attorney general of funds received under this section. Expenditures shall be reported within the following categories:

(i) Employee and contract for services costs.

(ii) Costs of materials and supplies.

(iii) Filing fees and other costs required to effectively represent utility consumers as provided in this section.

(b) Any additional information concerning uses of the funds received under this section required by the committees.

(22) On or before July 1 of each calendar year, the board shall submit a detailed report to the legislature regarding the discharge of duties and responsibilities under this section and section 6l during the preceding calendar year.

(23) Three years after the effective date of this section, and at 3-year intervals thereafter, a senate committee chosen by the majority leader of the senate and a house committee chosen by the speaker of the house of representatives shall review the relationship between costs and benefits resulting from this section and sections 6h through 6*l*, and may recommend changes to the legislature.

* * *

Section 6a, M.C.L. 460.6a, as amended in relevant part by 2008 P.A. 286, effective October 6, 2008.

M.C.L. 460.6a. Gas or electric utility; completed petition or application to increase rates and charges or to amend rate or rate schedules; notice and hearing; issuance or temporary order; refund; interest; automatic fuel or purchased gas adjustment clause; rules and procedures; adjustment clauses operating without notice and hearing abolished; separate hearing to determine cost of fuel, purchased gas, or purchased power; recovery of cost; definitions; final decision; filing time extension; approval of transportation rate schedules or transportation contracts; forms and instructions; recovery of amount by merchant plant; limitation; adjustment; "United States consumer price index" defined; orders to permit recovery under subsections (7) and (8).

Sec. 6a. (1) A gas or electric utility shall not increase its rates and charges or alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, without first receiving commission approval as provided in this section. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. The commission shall require notice to be given to all interested parties within the service area to be affected, and all interested parties shall have a reasonable opportunity for a full and complete hearing. A utility may use projected costs and revenues for a

future consecutive 12-month period in developing its requested rates and charges. The commission shall notify the utility within 30 days of filing, whether the utility's petition or application is complete. A petition or application is considered complete if it complies with the rate application filing forms and instructions adopted under subsection (6). A petition or application pending before the commission prior to the adoption of filing forms and instructions pursuant to subsection (6) shall be evaluated based upon the filing requirements in effect at the time the petition or application was filed. If the application is not complete, the commission shall notify the utility of all information necessary to make that filing complete. If the commission has not notified the utility within 30 days of whether the utility's petition or application is complete, the application is considered complete. If the commission has not issued an order within 180 days of the filing of a complete application, the utility may implement up to the amount of the proposed annual rate request through equal percentage increases or decreases applied to all base rates. For a petition or application pending before the commission prior to the effective date of the amendatory act that added this sentence, the 180-day period commences on the effective date of the amendatory act that added this sentence. If the utility uses projected costs and revenues for a future period in developing its requested rates and charges, the utility may not implement the equal percentage increases or decreases prior to the calendar date corresponding to the start of the projected 12-month period. For good cause, the commission may issue a temporary order preventing or delaying a utility from implementing its proposed rates or charges. If a utility implements increased rates or charges under this

subsection before the commission issues a final order, that utility shall refund to customers, with interest, any portion of the total revenues collected through application of the equal percentage increase that exceed the total that would have been produced by the rates or charges subsequently ordered by the commission in its final order. The commission shall allocate any refund required by this section among primary customers based upon their pro rata share of the total revenue collected through the applicable increase, and among secondary and residential customers in a manner to be determined by the commission. The rate of interest for refunds shall equal 5% plus the London interbank offered rate (LIBOR) for the appropriate time period. For any portion of the refund which, exclusive of interest, exceeds 25% of the annual revenue increase awarded by the commission in its final order, the rate of interest shall be the authorized rate of return on the common stock of the utility during the appropriate period. Any refund or interest awarded under this subsection shall not be included, in whole or in part, in any application for a rate increase by a utility. Nothing in this section impairs the commission's ability to issue a show cause order as part of its rate-making authority. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing. There shall be no increase in rates based upon changes in cost of fuel or purchased gas unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of fuel or purchased gas. The rates charged by any utility

pursuant to an automatic fuel or purchased gas adjustment clause shall not be altered, changed, or amended unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of the fuel or purchased gas.

(2) The commission shall adopt rules and procedures for the filing, investigation, and hearing of petitions or applications to increase or decrease utility rates and charges as the commission finds necessary or appropriate to enable it to reach a final decision with respect to petitions or applications within a period of 12 months from the filing of the complete petitions or applications. The commission shall not authorize or approve adjustment clauses that operate without notice and an opportunity for a full and complete hearing, and all such clauses shall be abolished. The commission may hold a full and complete hearing to determine the cost of fuel, purchased gas, or purchased power separately from a full and complete hearing on a general rate case and may be held concurrently with the general rate case. The commission shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent. As used in this section:

(a) "Full and complete hearing" means a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing.

(b) "General rate case" means a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service.

(3) Except as otherwise provided in this subsection, if the commission fails to reach a final decision with respect to a completed petition or application to increase or decrease utility rates within the 12-month period following the filing of the completed petition or application, the petition or application is considered approved. If a utility makes any significant amendment to its filing, the commission has an additional 12 months from the date of the amendment to reach a final decision on the petition or application. If the utility files for an extension of time, the commission shall extend the 12-month period by the amount of additional time requested by the utility.

(4) A utility shall not file a general rate case application for an increase in rates earlier than 12 months after the date of the filing of a complete prior general rate case application. A utility may not file a new general rate case application until the commission has issued a final order on a prior general rate case or until the rates are approved under subsection (3).

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(sub-paragraphs added by amendment, 2008 P.A. 286, effective October 6, 2008, including (5) through (9), excluded as irrelevant)

APPENDIX I

ADMINISTRATIVE PROCEDURES ACT OF 1969
Act 306 of 1969

AN ACT to provide for the effect, processing, promulgation, publication, and inspection of state agency rules, determinations, and other matters; to provide for the printing, publishing, and distribution of certain publications; to provide for state agency administrative procedures and contested cases and appeals from contested cases in licensing and other matters; to create and establish certain committees and offices; to provide for declaratory judgments as to rules; to repeal certain acts and parts of acts; and to repeal certain parts of this act on a specific date.

CHAPTER 1 GENERAL PROVISIONS

24.201 Administrative procedures; short title.

Sec. 1. This act shall be known and may be cited as the "administrative procedures act of 1969".

24.203 Definitions; A to G.

Sec. 3. (1) "Adoption of a rule" means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation.

(2) "Agency" means a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action. Agency does not include an agency in the legislative or judicial branch of state government, the governor, an agency having direct governing control over an institution of higher education, the state civil service commission, or an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.

(3) "Contested case" means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are deemed to be a continuous proceeding as though before a single agency.

(4) "Committee" means the joint committee on administrative rules.

(5) "Court" means the circuit court.

(6) "Guideline" means an agency statement or declaration of policy which the agency intends to follow, which does not have the force or effect of law, and which binds the agency but does not bind any other person.

* * *

CHAPTER 4
PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec. 71. (1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he

or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72. (1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

24.273 Subpoenas; issuance; revocation.

Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith

requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74. (1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee,

who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75. In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

24.275a Definitions; hearing where witness testifies as alleged victim of sexual, physical, or psychological abuse; use of dolls or mannequins; support person; notice; ruling on objection; exclusion of persons not necessary to

proceeding; section additional to other protections or procedures.

Sec. 75a. (1) As used in this section:

(a) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(2) This section only applies to a contested case in which a witness testifies as an alleged victim of sexual, physical, or psychological abuse. As used in this subsection, "psychological abuse" means an injury to the witness's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76. Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the

materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

24.277 Official notice of facts; evaluation of evidence.

Sec. 77. An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

24.278 Stipulations; disposition of cases, methods.

Sec. 78. (1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79. An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

24.280 Presiding officer; powers and duties; "nonmeeting day" defined.

Sec. 80. (1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after

the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

24.281 Proposals for decision; contents.

Sec. 81. (1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of

fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82. Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section

does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

24.285 Final decision and order.

Sec. 85. A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

24.286 Official records of hearings.

Sec. 86. (1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

24.287 Rehearings.

Sec. 87. (1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

* * *

APPENDIX J

CONSTITUTION OF 1963

Art. 6, § 28

§ 28. Administrative action, review

Sec. 28. All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

Property tax valuation or allocation; review

In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation.

APPENDIX K

MICHIGAN RULES OF COURT

STATE

2008

Rule 7.215 Opinions, Orders, Judgments, and Final Process from Court of Appeals

* * *

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. A party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

(2) A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

* * *

(J) Resolution of Conflicts in Court of Appeals Decisions.

(1) *Precedential Effect of Published Decisions.* A panel of the Court of Appeals must follow the rule of

law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

(2) *Conflicting Opinion.* A panel that follows a prior published decision only because it is required to do so by subrule (1) must so indicate in the text of its opinion, citing this rule and explaining its disagreement with the prior decision. The panel's opinion must be published in the official reports of opinions of the Court of Appeals.

(3) *Convening of Special Panel.*

(a) Poll of Judges. Except as provided in subrule (3)(b), within 28 days after release of the opinion indicating disagreement with a prior decision as provided in subrule (2), the chief judge must poll the judges of the Court of Appeals to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict that would have been created but for the provisions of subrule (1). Special panels may be convened to consider outcome-determinative questions only.

(b) Effect of Pending Supreme Court Appeal. No poll shall be conducted and a special panel shall not be convened if, at the time the judges are required to be polled, the Supreme Court has granted leave to appeal in the controlling case.

(c) Order. Immediately following the poll, an order reflecting the result must be entered. The chief clerk of the Court of Appeals must provide a

copy of the order to the Clerk of the Supreme Court. The order must be published in the official reports of opinions of the Court of Appeals.

(4) *Composition of Panel.* A special panel convened pursuant to this rule consists of 7 judges of the Court of Appeals selected by lot, except that judges who participated in either the controlling decision or the opinion in the case at bar may not be selected.

(5) *Consideration of Case by Panel.* An order directing the convening of a special panel must vacate only that portion of the prior opinion in the case at bar addressing the particular question that would have been decided differently but for the provisions of subrule (1). The special panel shall limit its review to resolving the conflict that would have been created but for the provisions of subrule (1) and applying its decision to the case at bar. The parties are permitted to file supplemental briefs, and are entitled to oral argument before the special panel unless the panel unanimously agrees to dispense with oral argument. The special panel shall return to the original panel for further consideration [of] any remaining, unresolved issues, as the case may require.

(6) *Decision.* The decision of the special panel must be by published opinion or order and is binding on all panels of the Court of Appeals unless reversed or modified by the Supreme Court.

(7) *Reconsideration; Appeal.* There is no appeal from the decision of the Court of Appeals as to whether to convene a special panel. As to the decision in the case at bar, the time limits for moving for

reconsideration or for filing an application for leave to appeal to the Supreme Court run from the date of the order declining to convene a special panel or, if a special panel is convened, from the date of the decision of the special panel, except that, if the case is returned to the original panel for further consideration in accordance with subrule (5), the time limits shall run from the date of the original panel's decision, after return from the special panel. If a motion for reconsideration is filed, it shall be submitted to the special panel, which, if appropriate, may refer some or all of the issues presented to the original panel.

APPENDIX L

COURT OF APPEALS MICHIGAN

Docket No. 264859

[Filed April 24, 2007]

In re APPLICATION of INDIANA MICHIGAN POWER CO. Michigan Environmental Council and Public Interest Research Group in Michigan, *Appellants,*	)
v.	)
Michigan Public Service Commission and Indiana Michigan Power Company, *Appellees.*	)

Submitted April 5, 2007, at Lansing.
Decided April 24, 2007, at 9:20 a.m.

Indiana Michigan Power Company (IMPCo) filed an application in the Public Service Commission (PSC) for approval of its 2004 power supply cost recovery (PSCR) plan, which included the cost of fees paid to the United States Department of Energy (DOE) for the disposal of spent nuclear fuel (SNF). The PSC approved the plan over the objections of Michigan Environmental Council (MEC) and Public Interest Research Group in

Michigan (PIRGIM), which contended that IMPCo had not acted reasonably and prudently by paying fees for nuclear waste disposal to the DOE despite the fact that no federal nuclear waste disposal program currently exists. The PSC denied a motion for rehearing, and MEC and PIRGIM appealed.

The Court of Appeals *held*:

1. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art 6, § 28 and MCL 24.285 is unsubstantiated. The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. IMPCo presented evidence that payment of SNF disposal fees was mandated by federal law, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on this evidence to conclude that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose remedies such as those appellants suggested, and appellants identified no statute or caselaw to the contrary.

2. The PSC acted in accordance with its statutory authority in concluding that IMPCo had not acted unreasonably or imprudently by continuing to pay SNF fees in light of testimony that payment was required by law, that other utilities were making SNF payments, that failure to make the payments could result in the loss of its operating licence, and that it

had supported litigation to compel the federal government to fulfill its duties with respect to SNF disposal. The case on which appellants rely for the proposition that payment of SNF fees is no longer mandatory did not hold that a utility's payment of SNF fees is contingent on the existence of a disposal facility; rather, it held that the DOE had a duty to accept SNF from utilities despite the fact that there was not yet an operational disposal facility.

3. The PSC correctly concluded that considering the appellants' recommendations and proposed remedies was beyond the scope of its jurisdiction in the absence of a determination that IMPCo's actions were unreasonable or unlawful.

Affirmed.

Clark Hill PLC (by *Don L. Keskey*), Lansing, for the Michigan Environmental Council and the Public Interest Research Group in Michigan.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *David A. Voges*, *Michael A. Nickerson*, and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

Honigman Miller Schwartz and Cohn LLP (by *Richard J. Aaron*) for the Indiana Michigan Power Company.

Before: SAAD, P.J., and HOEKSTRA and SMOLENSKI, JJ.

SAAD, P.J. Michigan Environmental Council and Public Interest Research Group in Michigan appeal orders of the Michigan Public Service Commission (PSC) that approved the 2004 power supply cost recovery (PSCR) plan filed by Indiana Michigan Power Company (IMPCo) and denied appellants' petition for rehearing. We affirm.

I. INTRODUCTION

MCL 460.6j(2) authorizes the PSC to include a PSCR clause in a utility's rate schedule.[1] A PSCR clause is "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a). Each year, a utility with a PSCR clause in its rate schedule must file a PSCR plan for the upcoming year and a five-year forecast of power supply requirements. MCL 460.6j(3) and (4). The PSC approves, disapproves, or modifies the proposed PSCR plan. MCL 460.6j(6). After the end of the year, the PSC conducts a reconciliation case in which it makes adjustments to take into account the utility's true cost of supplying power. MCL 460.6j(12) and (13).

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[1] MCL 460.6j was added by 1982 PA 304 (Act 304).

IMPCo owns and operates a nuclear generating plant that supplies electricity to customers in Michigan. Spent nuclear fuel (SNF) is stored at an on-site facility at the plant. IMPCo entered into a standard contract with the United States Department of Energy (DOE), as required by the Nuclear Waste Policy Act (NWPA), 42 U.S.C. 10101 *et seq.* Under such a contract, the utility pays a fee to the DOE for a federal SNF disposal program. This program was scheduled to begin no later than January 31, 1998. At the time the briefs were filed, the DOE estimated that the program would not begin before 2010.[2] The utilities classify the SNF fee as a nuclear fuel expense and include the cost in their PSCR plans.

II. UNDERLYING FACTS AND PROCEEDINGS

IMPCo filed an application with the PSC seeking approval of its PSCR plan for the year 2004. In the administrative proceeding, appellants presented the testimony of a nuclear energy consultant who asserted that ratepayers were being charged excessive costs associated with nuclear waste and its disposal, including the cost of the SNF fee paid by IMPCo to the DOE. The witness contended that IMPCo had not acted reasonably and prudently regarding its continued payment of the SNF fee because it had

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[2] We take judicial notice that the Department of Energy website currently states that, under the "Best-Achievable Repository Construction Schedule," the repository will not begin receipt of SNF until March 31, 2017. U.S. Department of Energy, Civilian Radioactive Waste Management < http:// www. ocrwm. doe. gov/ ym_ repository/ about_ project/ index. shtml> (accessed April 11, 2007).

failed to take necessary action to mitigate or minimize the costs, or to protect ratepayers from the risk of loss of the amounts paid. Appellants contend that IMPCo failed to enforce its contract with the DOE, and failed to undertake self-help remedies. The witness opined that the PSC should disallow inclusion of IMPCo's SNF expense in IMPCo's PSCR clause. Alternatively, appellants aver that IMPCo should be required to refile its case and explain its actions concerning the SNF fees.

IMPCo presented a witness who opined that the utility had acted reasonably and prudently with respect to the collection and payment of SNF fees. The witness testified that if IMPCo refused to pay the SNF fee to the DOE, the Nuclear Regulatory Commission could determine that IMPCo's SNF disposal program was not viable, and could refuse to license IMPCo's nuclear plant. The witness also said that IMPCo had engaged in self-help, including participating in litigation to attempt to force the DOE to adhere to its obligations under the standard contract.

The PSC approved the PSCR plan filed by IMPCo. The PSC noted that SNF costs resulted from disposal of nuclear fuel rods and that, pursuant to MCL 460.6j(1)(a), a utility was entitled to recover disposal costs through its PSCR clause. The PSC found that IMPCo did not act unreasonably or imprudently with respect to the handling of SNF issues; accepted IMPCo's assertion that to cease paying SNF fees to the DOE could result in consequences such as suspension of IMPCo's license to operate its nuclear facility; disagreed with appellants' contention that utilities, and not ratepayers, were responsible for payment of

SNF fees; and observed that it had rejected appellants' arguments in previous cases. The PSC denied appellants' motion for rehearing.

III. ANALYSIS

The standard of review for PSC orders is narrow and well defined. MCL 462.25 provides that all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Michigan Consolidated Gas Co. v. Pub. Service Comm.*, 389 Mich. 624, 635-636, 209 N.W.2d 210 (1973). A party aggrieved by an order of the PSC has the burden to prove by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow the mandates of a statute or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint,* 460 Mich. 396, 427, 596 N.W.2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc. v. Pub. Service Comm.*, 377 Mich. 259, 279, 140 N.W.2d 515 (1966).

We must give due deference to the PSC's administrative expertise, and will not substitute our judgment for that of the PSC. *Attorney Gen. v. Pub. Service Comm. No. 2,* 237 Mich.App. 82, 88, 602 N.W.2d 225 (1999). However, we may not abandon our responsibility to interpret statutory language and legislative intent. *Miller Bros. v. Pub. Service Comm.*, 180 Mich App. 227, 232, 446 N.W.2d 640 (1989). Statutory interpretation is a question of law subject to

review de novo. As a general rule, we will defer to the construction placed on a statute by a government agency charged with interpreting it, unless the agency interpretation is not supported by the record or is otherwise unreasonable. *In re Canales Complaint,* 247 Mich.App. 487, 496, 637 N.W.2d 236 (2001). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan,* 254 Mich App. 675, 682, 658 N.W.2d 849 (2003).

1. DECISION ON SNF ISSUES

Appellants argue that the PSC's orders here are unlawful and unreasonable because the PSC's decision on the SNF issues is not supported by competent, material, and substantial evidence on the whole record as required by Const. 1963, art. 6, § 28, and does not make findings of fact and conclusions of law that allow for meaningful appellate review, as required by MCL 24.285. We disagree.

Appellants take the position that the PSC had the authority and the duty to undertake a broad investigation of IMPCo's actions with regard to SNF issues, and, at a minimum, disallow recovery of SNF costs through IMPCo's PSCR clause on the ground that IMPCo had acted unreasonably and imprudently with respect to collection of the costs from ratepayers and payment of the fees to the DOE.[3]

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[3] The PSC conducted the case according to the requirements set forth in MCL 460.6j. Appellants participated fully; the assertion

Appellants say that the PSC should have taken the position that IMPCo's request that it be allowed to recover SNF costs from ratepayers through its PSCR clause was presumptively unreasonable in light of the DOE's failure to commence an SNF disposal program, and should have required IMPCo to overcome that presumption. No authority allows the PSC to make such an assumption. Rather, the PSC must "evaluate the reasonableness and prudence of the decisions underlying" a utility's PSCR plan, and "approve, disapprove, or amend" the PSCR plan in light of that evaluation. MCL 460.6j(6).

IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants. *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich.App. 470, 481, 344 N.W.2d 321 (1983). Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.

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that appellants did not receive the notice required by MCL 460.6a(1) is without merit.

The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art. 6, § 28 and MCL 24.285 is unsubstantiated.

2. PROCEDURAL/DISCOVERY ISSUES

Appellants argue that the PSC's orders here are unlawful and unreasonable because the hearing referee and the PSC engaged in a one-sided review process. The referee denied appellants' motion to compel discovery of actions IMPCo might have taken to better enforce its standard contract with the DOE, and also denied appellants' motion to strike portions of IMPCo's testimony that appellants regard as conclusory. However, the referee granted IMPCo's motion to strike portions of appellants' expert evidence regarding SNF issues. The PSC affirmed these rulings. Appellants assert that this review process denied them due process, adequate judicial review, and notice and an opportunity to be heard. We disagree.

A party may not simply announce its position and then leave it to this Court to discover and rationalize the basis for its claims. *Wilson v. Taylor*, 457 Mich. 232, 243, 557 N.W.2d 100 (1998). Furthermore, a party may not give an issue cursory treatment with little or no citation of supporting authority. *Silver Creek Twp. v. Corso*, 246 Mich.App. 94, 99, 631 N.W.2d 346 (2001). Appellants' argument on this issue contains no specifics regarding what discovery matters they believe were improperly withheld, or what testimony

proffered by their witness was improperly stricken from the record. Appellants do not explain how the PSC would have decided this matter differently had the discovery material and testimony been before it on the record. The lack of specifics in appellants' argument leads us to conclude that this issue has been abandoned. *Yee v. Shiawassee Co. Bd. of Comm'rs,* 251 Mich.App. 379, 406, 651 N.W.2d 756 (2002).

3. EFFECT OF FEDERAL LAW

Appellants observe that IMPCo's basis for arguing that it was entitled to recover the SNF fees paid to the DOE was that payment of the fees is mandated by federal law. Appellants maintain that in *Indiana Michigan Power Co. v. Dep't of Energy,* 319 U.S.App.D.C. 209, 88 F.3d 1272 (1996), the court held that a utility's obligation to pay SNF fees was reciprocal to the DOE commencing SNF disposal by January 31, 1988. *Id.* at 214. *Moreover,* in *Northern States Power Co. v. Dep't of Energy,* 128 F.3d 754, 757 (C.A.D.C., 1997), the court stated that the DOE's obligation to meet the January 1998 deadline was unconditional. Appellants contend that a utility's duty to pay SNF fees is reciprocal to the DOE's duty to commence disposing of SNF in a timely manner and that, because the DOE did not fulfill its duty, a utility such as IMPCo has no duty to continue paying SNF fees to the DOE. Therefore, appellants assert, the PSC had the authority to protect ratepayers by denying IMPCo's request to recover SNF costs through its PSCR clause, or by requiring IMPCo to take other steps to protect ratepayers. We disagree.

Appellants' reliance on *Indiana Michigan Power Co., supra,* for the proposition that the payment of SNF fees is no longer mandatory, is misplaced. In that case, the court addressed the DOE's assertion that the DOE had no clear obligation under the NWPA to accept SNF from utilities absent the existence of an operational disposal facility. The court disagreed and concluded that under 42 U.S.C. 10222(a)(5), the DOE's duty to dispose of SNF was conditioned on the payment of disposal fees by utilities. Nothing in the statute indicated that the duty to dispose of SNF was tied to the commencement of operation of a disposal facility. *Id.* at 212-213. *Indiana Michigan Power Co.* does not hold that a utility's payment of SNF disposal fees is contingent on the DOE's putting into operation a disposal facility no later than January 31, 1998. The payment of SNF fees by a utility is mandated by 42 U.S.C. 10222.

A witness for IMPCo testified that IMPCo's actions with respect to collection of SNF costs from ratepayers and payment of SNF fees to the DOE were reasonable and prudent. The witness noted that (1) payment was required under IMPCo's standard contract with the DOE; (2) IMPCo's decision to pay the fees notwithstanding the federal government's delay in completing a disposal site was consistent with action taken by other utilities; (3) if IMPCo refused to pay the fees it risked losing its license to operate its nuclear power plant; and (4) IMPCo had supported litigation to compel the federal government to fulfill its duties under the NWPA.

The PSC has the discretion to consider a variety of factors when setting just and reasonable rates,[4] and the authority granted to the PSC is set out in MCL 460.6a and MCL 460.6j. The PSC acted in accordance with this authority and properly concluded that, in the absence of a finding of unreasonable or imprudent conduct on the part of a utility, it lacked the authority to impose the remedies suggested by appellants, including placing the burden of paying SNF fees on IMPCo's stockholders rather than on IMPCo's ratepayers. Appellants have not shown by clear and satisfactory evidence that the PSC's decision is unlawful or unreasonable. MCL 462.26(8).[5]

4. SCOPE OF JURISDICTION

In a PSCR proceeding, the PSC acts under the scope of authority granted to it in MCL 460.6j. Pursuant to that statute, the PSC was required to evaluate the reasonableness and prudence of IMPCo's PSCR plan, and to approve, disapprove, or modify the plan on the basis of its conclusions.

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[4] See *Detroit v. Public Service Comm.*, 308 Mich. 706, 718, 14 N.W.2d 784 (1944).

[5] Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption. Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, see *ABATE v. Pub. Service Comm.*, 192 Mich.App. 19, 22-27, 480 N.W.2d 585 (1991) (holding that states must give effect to rates approved by the Federal Energy Regulatory Commission), and SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. 10222(a).

Appellants argue that the PSC erred in concluding that consideration of their recommendations and proposed remedies was beyond the scope of its jurisdiction in a PSCR clause case. In a PSCR, the PSC has the statutory authority to conduct a full evidentiary hearing and to consider all relevant factors when determining what costs are recoverable. MCL 460.6j(6). Appellants maintain that the PSC had the authority to disallow recovery of SNF costs through IMPCo's PSCR clause. Alternatively, appellants assert that the PSC had the authority to impose lesser remedies, such as requiring IMPCo to submit detailed reports and data regarding SNF; place SNF disposal fees collected from ratepayers into an escrow account to ensure that the funds would be available for alternative SNF disposal programs in the event that the DOE does not commence its own disposal program; and file a performance bond or to secure an insurance policy to ensure proper performance of SNF disposal. We disagree.

IMPCo sought to recover costs related to SNF disposal and payment of SNF fees in its PSCR clause. The PSC did not find that IMPCo acted unreasonably or imprudently with respect to SNF disposal issues and payment of SNF fees to the DOE. Appellants cite no statute or caselaw that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the PSCR application to adopt remedies such as those suggested by appellants. The PSC correctly concluded that if it determines that a utility's actions are reasonable and lawful, it has no authority to adopt

extraordinary remedies such as those proposed by appellants. See *Attorney General, supra* at 88.

5. APPELLATE PRECEDENT

Appellants argue that this Court's decision in *Michigan Environmental Council v. Pub. Service Comm*[6] does not serve as precedent to support affirmance of the PSC's decision for several reasons. First, the PSC proceeding reviewed in that case concerned two Wisconsin utilities that served small portions of the Upper Peninsula of Michigan and did not store SNF in Michigan, whereas in this case, IMPCo serves many Michigan customers and stores SNF in an on-site facility in Michigan. Second, the appellants did not seek outright disallowance of recovery of the SNF costs, as they did here. Third, in the opinion in that case, this Court acknowledged that issues raised by the appellants were appropriate for consideration, albeit not in a PSCR proceeding. Fourth, the PSC noted that SNF disposal issues are significant. Finally, because the opinion is unpublished, the PSC's reliance on it is erroneous. We disagree.

This Court's decision in *Michigan Environmental Council, supra,* is unpublished, and therefore does not constitute binding precedent. MCR 7.215(C)(1). Nevertheless, we consider its analysis to be persuasive. See, e.g., *Watson v. Bureau of State*

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[6] Unpublished opinion per curiam of the Court of Appeals, issued December 9, 2003, 2003 WL 22902853 (Docket Nos. 240403, 240406).

Lottery, 224 Mich.App. 639, 648, 569 N.W.2d 878 (1997). Here, the PSC was entitled to note that its rejection of appellants' issues had been upheld in other proceedings. The arguments raised by appellants in *Michigan Environmental Council* were substantially similar to those raised here.

IV. CONCLUSION

For the reasons set forth in this opinion, we affirm the PSC's orders approving IMPCo's PSCR application and denying appellants' petition for rehearing.

APPENDIX M

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

[Filed April 1, 2008]

No. 261718
Public Service Commission
LC No. 00-013917

ADRIAN ENERGY ASSOCIATION, L.L.C., CADILLAC RENEWABLE ENERGY, L.L.C., GENESEE POWER STATION, L.P., GRAYLING GENERATING STATION, L.P., HILLMAN POWER COMPANY, L.L.C., TES FILER CITY STATION, L.P. VIKING ENERGY OF LINCOLN, INC., and VIKING ENERGY OF MCBAIN, INC.,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, MIDLAND COGENERATION VENTURE, L.P., and ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
Appellees.

No. 261747
Public Service Commission
LC No. 00-013917

ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, ADRIAN ENERGY ASSOCIATION, L.L.C., CADILLAC RENEWABLE ENERGY, L.L.C., GENESEE POWER STATION, L.P., GRAYLING GENERATING STATION, L.P., HILLMAN POWER COMPANY, L.L.C., TES FILER CITY STATION, L.P., VIKING ENERGY OF LINCOLN, INC., VIKING ENERGY OF MCBAIN, INC., and MIDLAND COGENERATION VENTURE, L.P.,
Appellees.

No. 264860
Public Service Commission
LC No. 00-013917

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP,
Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION

and CONSUMERS ENERGY COMPANY,)
Appellees.)
)

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

These three consolidated appeals arise from the Public Service Commission's February 28, 2005, order in response to Consumers Energy Company's application for approval of a power supply cost recovery (PSCR) plan, and for authorization of monthly PSCR factors for 2004. We affirm.

* * *

(Irrelevant portions excluded)

* * *

In Docket No. 264860, appellants Michigan Environment Council (MEC) and Public Interest Research Group in Michigan (PIRGIM) echo the Attorney General's objections to allowing Consumers to raise its PSCR clause despite statutory rate caps, and additionally take issue with the PSC's having allowed Consumers to recover, through its PSCR clause, its costs relating to disposal of spent nuclear fuel.

II. Standards of Review

A final order of the PSC must be authorized by law and be supported by competent, material, and

substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Public Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. MCL 462.25. See also *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecommunications Complaint*, *supra*, 460 Mich 396, 427; 596 NW2d 164 (1999).

A reviewing court should defer to the PSC's administrative expertise, and not substitute its judgment for that of the PSC. *Attorney General v Public Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). Discovery decisions are reviewed for an abuse of discretion. See *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003). Contract interpretation likewise presents a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

* * *

(Irrelevant portions excluded)

* * *

B. Costs of Spent Nuclear Fuel

MEC/PIRGIM argue that the PSC erred in striking substantial portions of the evidence offered by their expert concerning the management of spent nuclear fuel, then including the disposal costs of such fuel in the resulting rates. However, this Court has held that "in the absence of evidence that [the utility] acted unreasonably and imprudently with regard to the collection of [spent nuclear fuel] costs, [the PSC] had no authority to impose additional remedies such as those suggested by appellants." *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 375; 738 NW2d 289 (2007). See also *id.* at 379-380 ("Appellants cite no statute or caselaw that holds that in a PSCR proceeding in which no finding that a utility engaged in unreasonable or imprudent conduct has been made, the PSC is authorized to go beyond approving the PSCR application to adopt remedies such as those suggested by appellants.").

Because this Court has held that consideration of appellants' recommendations and proposed remedies connected with disposal of spent nuclear fuel is beyond the scope of a PSCR proceeding, the PSC did not err by striking such recommendations and proposed remedies in this instance.

MEC/PIRGIM raise several additional issues in connection with how the PSC treated costs relating to the disposal of spent nuclear fuel, based on a contract with the federal Department of Energy. We need not address those issues here, however, because they have been decided, uniformly in favor of the PSC's position, in an earlier, binding case of this Court. *In re Application of Detroit Edison Co, supra* at 240-241, citing *In re Application of Indiana Michigan Power Co, supra*. In this case, the PSC correctly disposed of these issues below by reiterating that questions relating to the costs of disposal of spent nuclear fuel were beyond the scope of its proceedings.

C. Precedents

MEC/PIRGIM argue that the PSC over-relied on nonbinding precedents in reaching its decision in this case. We disagree.

In discussing appellants' exceptions to the proposal for decision, the PSC cited two of its earlier cases, and this Court's unpublished opinion affirming them. The PSC expressed its intention to decide appellants' issues in harmony with those decisions.

This Court has recently reaffirmed that recourse to existing PSC decisions, and this Court's unpublished affirmances of them, is proper consultation of persuasive, though not binding, authority. *In re Application of Detroit Edison Co, supra* at 229 n 14 and accompanying text; *In re Application of Indiana Michigan Power Co, supra* at 380-381. Appellants cite no statement of the PSC that suggests that the PSC mistakenly treated this Court's unpublished decisions

as mandatory, instead of persuasive, authority, and we have found none. The PSC thus did not err in deciding the instant case so as to comport with its earlier affirmed decisions.

VII. Conclusion

For the reasons discussed above, we affirm each of these three consolidated cases in its entirety.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto

APPENDIX N

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket No. 136433

[Filed September 19, 2008]

SC: 136433
COA: 264860
MPSC: U-013917

MICHIGAN ENVIRONMENTAL COUNCIL and PUBLIC INTEREST RESEARCH GROUP, Appellants,	)
v.	)
MICHIGAN PUBLIC SERVICE COMMISSION and CONSUMERS ENERGY COMPANY, Appellees.	)

On order of the Court, the application for leave to appeal the April 1, 2008 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Seal of the Michigan
Supreme Court Lansing

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2008 /s/ Corbin R. Davis
Clerk

APPENDIX O

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 98-1843 (DWF/AJB)

[Filed December 23, 1999]

Patrick Roedler; Thomas McDonough; Jeannie Strobel; Richard Palmer; Noreen Hoft; and HJ Company,

Plaintiffs,

v.

United States Department of Energy; the Secretary of the Treasury of the United States; and the United States of America,

Defendants,

and

Northern States Power Company,

Nominal Defendant.

John A. Cochrane, Esq., Cochrane & Bresnahan, 24 East Fourth Street, St. Paul, Minnesota, 55101; Brian B. O'Neill, Esq., Elizabeth H. Schmiesing, Esq., Faegre & Benson, 90 South Seventh Street, Suite 2200, Minneapolis, Minnesota 55402; and Rodney A. Wilson, Esq., Wilson Law Office, 701 Fourth Avenue South, Suite 500, Minneapolis, Minnesota 55415, for Plaintiffs.

Jack Kaufman, Esq., United States Department of Justice, P.O. Box 875, Ben Franklin Station, Washington, D.C., 20044, for Defendants United States Department of Energy, the Secretary of the Treasury of the United States, and the United States of America.

Timothy R. Thornton, Esq., Briggs & Morgan, 80 South Eighth Street, Suite 2400, Minneapolis, Minnesota 55402, for Nominal Defendant Northern States Power Company.

Julia E. Anderson, Assistant Attorney General, Minnesota Attorney General's Office, 445 Minnesota Street, St. Paul, Minnesota 55101, for Amici Minnesota Public Utilities Commission and Minnesota Department of Public Service.

JUDGES: DONOVAN W. FRANK, Judge of United States District Court.

OPINION BY: DONOVAN W. FRANK

MEMORANDUM OPINION AND ORDER

Introduction

This case arises under the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C.A. § 10101, *et seq.* Specifically, the lawsuit focuses on a contract between Defendant United States Department of Energy ("DOE") and Nominal Defendant Northern States Power Company ("NSP"), under which DOE is obligated to dispose of NSP's spent nuclear fuel in exchange for fees paid by NSP to DOE. The Plaintiffs and putative class members are ratepayers of NSP who allege that they are entitled to damages and other equitable relief from DOE, the Secretary of the Treasury of the United States, and the United States of America (collectively, the "Federal Defendants") for DOE's breach of the contract.

The matter is currently before the Court on the Federal Defendants' Motion to Dismiss the Plaintiffs' Complaint and NSP's Motion to Dismiss the Plaintiffs' Complaint or for Summary Judgment. Due to the status of discovery, a motion for summary judgment is premature, and the motions to dismiss the Plaintiffs' Complaint will be treated as motions to dismiss. The matter is also before the Court pursuant to the Federal Defendants' Motion to Dismiss NSP's Crossclaim. NSP concedes that if the Plaintiffs' Complaint is dismissed, then NSP's Crossclaim is moot.

The Minnesota Public Utilities Commission ("MPUC") and the Minnesota Department of Public Service (collectively, the "State Agencies") filed a joint amici brief in support of the Defendants' motions to

dismiss. The State Agencies request that the Court dismiss the Plaintiffs' lawsuit in deference to the MPUC's jurisdiction over the rates charged by NSP and in recognition of and deference to the ability of the State Agencies to protect ratepayers' interests.

For the reasons stated below, the Court does not have subject matter jurisdiction over the present litigation, and the Plaintiffs otherwise fail to state a claim for which relief may be granted. Therefore, the Federal Defendants' and NSP's Motions to Dismiss are granted. NSP's Crossclaim is thus moot and is dismissed also.

Background

In 1982, Congress enacted the NWPA to protect the public health and the environment from the potential risks associated with radioactive waste. 42 U.S.C.A. § 10131(a). The NWPA assigns to the federal government the responsibility to provide for the permanent disposal of spent nuclear fuel, and it directs that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C. § 10131(a)(4). *Northern States Power Company v. United States*, 43 Fed. Cl. 374, 376 (Fed.Cl. 1999). The NWPA provides that the generators and owners of spent nuclear fuel have the responsibility to provide for and pay the costs of the interim storage of the spent nuclear fuel until the waste is accepted by DOE. 42 U.S.C.A. § 10131(a)(5).

The NWPA authorized DOE to enter into contracts with owners and generators of spent nuclear fuel,

pursuant to which DOE is to accept and dispose of the spent nuclear fuel in exchange for the payment of fees from the owners and generators. 42 U.S.C.A. § 10222(a)(1). DOE regulations set forth a "Standard Contract" form to be used by DOE in entering into these contracts. 10 C.F.R. § 961.11. Under the contracts, the owners and generators are to pay statutorily imposed fees to DOE, in return for which DOE would dispose of the spent nuclear fuel, "beginning not later than January 31, 1998." 42 U.S.C.A. § 10222(a)(5)(b).

The NWPA also established the Nuclear Waste Fund ("NWF"), "composed of payments made by the generators and owners of such waste and spent fuel." 42 U.S.C.A. §§ 10131(b)(4), 10222(c). The Secretary of the Treasury is the custodian of the NWF. 42 U.S.C.A. § 10222(c). The NWPA specifies that expenditures may only be made from the NWF for administrative and operation purposes having a direct bearing upon radioactive waste disposal activities. 42 U.S.C.A. § 10222(d). The Plaintiffs allege that DOE has earned interest on the funds in the NWF from their placement in interest-bearing accounts by the United States Treasury and that NSP's payments alone have earned over $90 million in interest through 1997. (Complaint at ¶ 48.)

In June of 1983, DOE executed three virtually identical contracts with NSP (collectively, the "NSP Standard Contract") for the disposal of NSP's spent nuclear fuel, using the Standard Contract form set forth in 10 C.F.R. § 961.11. (Complaint at ¶ 12.) Article VIII of the NSP Standard Contract requires NSP, as "Purchaser," to pay DOE 1.0 mill per kWh of energy

generated by nuclear means by the facility named in the contract. The 1.0 mill per kWh fee was statutorily mandated by the NWPA. 42 U.S.C.A. § 10222(a)(2). NSP funds this fee through a line item charge on its ratepayers' monthly electricity bills. (Complaint at ¶ 47.)

DOE failed to begin accepting the spent nuclear fuel by January 31, 1998, and as yet, has not begun accepting any spent nuclear fuel. (Complaint at ¶ 40.)

DOE's breach has already been judicially determined in two cases brought under the NWPA. In 1995, DOE published a Notice in the Federal Register, setting forth its conclusion that it did not have an obligation to begin accepting spent nuclear fuel for disposal beginning January 31, 1998, absent the existence of a repository or interim storage facility by that date. 60 Fed. Reg. 21793 (May 3, 1995).

The United States Court of Appeals for the District of Columbia Circuit disagreed, holding that the NWPA created an unconditional obligation in DOE, reciprocal to the utilities' obligation to pay the fees into the NWF, to start disposing of the spent nuclear fuel no later than January 31, 1998. *Indiana Michigan Power Co. v. Dept of Energy,* 88 F.3d 1272, 1276 (D.C. Cir. 1996). The Court of Appeals held that a determination of the appropriate remedy was premature at that time, however, as DOE had not yet defaulted upon its statutory or contractual obligations. *Indiana Michigan,* 88 F.3d at 1277.

Following the *Indiana Michigan* decision, various state regulatory agencies and utilities, including NSP,

petitioned the court for a writ of mandamus requiring DOE to begin disposing of the spent nuclear fuel by the statutory and contractual deadline of January 31, 1998. While the Court of Appeals reaffirmed that DOE had a clear duty to act and the petitioners had a clear right to relief, the Court of Appeals declined to issue the broad writ of mandamus sought because the petitioners had an adequate remedy under the Standard Contracts. *Northern States Power Co. v. United States Dept. of Energy,* 128 F.3d 754, 759 (D.C. Cir. 1997).

On June 6, 1998, prior to the Plaintiffs' filing of this lawsuit, NSP filed a complaint in the United States Court of Federal Claims against the United States, seeking monetary relief for the United States' breach of the NSP Standard Contract. *Northern States Power Co. v. United States,* 98-484C (Fed. Cl.). On April 6, 1999, the Court of Federal Claims granted the United States' motion to dismiss for failure to exhaust the administrative remedies set forth in the NSP Standard Contract. *Northern States Power Co. v. United States,* 43 Fed. Cl. 374, 388 (1999).

On August 7, 1998, the Plaintiffs commenced the present litigation. The Plaintiffs and putative class members are utility customers, or ratepayers, of NSP. (Complaint at ¶ 14.) The Plaintiffs' Complaint is set forth as follows: Count One, Breach of Contract; Count Two, Breach of Implied Contract; Count Three, Taking, Pursuant to the Tucker Act; Count Four, Unjust Enrichment; Count Five, Fifth Amendment Taking and Due Process; and Count Six, Declaration of NSP's Interest, seeking a declaration that NSP has

no title to the funds it has collected from the Plaintiffs and an injunction against further collections.

The Plaintiffs do not allege any wrongdoing by NSP and seek no monetary relief against NSP, but rather have named NSP as a "Nominal Defendant."

Discussion

A. Standard of Review

In the present matter, the Federal Defendants have moved for dismissal, while NSP has moved for dismissal or, in the alternative, for summary judgment. The Plaintiffs argue that NSP's motion is properly considered as a motion for summary judgment, due to the parties' introduction of matters outside the pleadings. The Plaintiffs further argue that consideration of a summary judgment motion would be premature, due to the status of discovery.

The Court agrees that a motion for summary judgment is premature. However, the Court finds that the matter is capable of resolution as a motion to dismiss.

The Defendants move for dismissal pursuant to both Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

Dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) will not be granted lightly. *Wheeler v. St. Louis Southwestern Ry. Co.*, 90 F.3d 327, 329 (8th Cir. 1996), citing *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992), *cert. denied*, 507

U.S. 992, 113 S.Ct. 1602, 123 L.Ed.2d 164 (1993). Dismissal is proper, however, where an attack on the complaint's alleged basis for subject matter jurisdiction reveals that there is no actual basis for jurisdiction. *Wheeler,* 90 F.3d at 329, citing *Bowe,* 974 F.2d at 103.

The district court has authority to consider matters outside the pleadings when subject matter jurisdiction is challenged under Rule 12(b)(1). *Osborne v. U.S.,* 918 F.2d 724, 728 n. 4 (8th Cir. 1990), citing *Land v. Dollar,* 330 U.S. 731, 735 & n. 4, 67 S.Ct. 1009, 1011 & n. 4, 91 L.Ed. 1209 (1947). Consideration of matters outside the pleadings under such circumstances does not convert the proceedings to a Rule 56 summary judgment motion. *Osborne,* 918 F.2d at 729.

A complaint shall be dismissed for failure to state a claim under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would demonstrate an entitlement to relief. *Springdale Educ. Assn. v. Springdale School Dist.,* 133 F.3d 649, 651 (8th Cir. 1998); *Parnes v. Gateway 2000, Inc.,* 122 F.3d 539, 545 (8th Cir. 1997), citing *Fusco v. Xerox Corp.,* 676 F.2d 332, 334 (8th Cir. 1982). Dismissal is proper only when the complaint on its face reveals "some insuperable bar to relief." *Duffy v. Landberg,* 133 F.3d 1120, 1122 (8th Cir. 1998), quoting *Frey v. City of Herculaneum,* 44 F.3d 667, 671 (8th Cir. 1995).

The allegations in the complaint must be treated as true and must be construed in the plaintiff's favor. *Duffy,* 133 F.3d at 1122. However, conclusory allegations of law and unwarranted inferences of fact

do not suffice to support a claim. *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998).

In deciding a motion to dismiss under Rule 12(b)(6), the court may consider matters of public record. *Sebastain v. U.S.*, 185 F.3d 1368, 1374 (Fed. Cir. 1999). In addition, the court may generally consider documents integral to the complaint and upon which the complaint relies, even when not attached to the complaint and produced instead by the defendant in support of a motion to dismiss. *Brogren v. Pohlad*, 933 F.Supp. 793, 798 (D. Minn. 1995). In the present matter, the NSP Standard Contract is referenced in the Complaint and is integral to and provides the basis of the Plaintiffs' claims. The Court may therefore consider the NSP Standard Contract and matters of public record without converting the present motions to dismiss into motions for summary judgment.

B. Sovereign Immunity and Subject Matter Jurisdiction

Under the doctrine of sovereign immunity, the United States is immune from suit unless it consents to be sued. *Miller v. Tony and Susan Alamo Foundation*, 134 F.3d 910, 915, (8th Cir. 1998). Waivers of the federal government's sovereign immunity must be unequivocally expressed in statutory text. *Miller*, 134 F.3d at 915. The United States' consent to be sued must be strictly construed in favor of the sovereign. *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 1014-15, 117 L.Ed.2d 181 (1992). In the absence of a waiver of sovereign immunity, the court lacks subject matter jurisdiction. *F.D.I.C. v. Meyer*, 510 U.S.

471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d 308 (1994); *Miller*, 916 F.3d at 915-16.

In the present matter, the Plaintiffs pursue their contract and taking claims, set forth in Counts One, Two, Three, and Five, under the Tucker Act, 28 U.S.C.A. § 1346(a)(2). The Plaintiffs seek to pursue their due process claim under Section 702 of the Administrative Procedure Act, 5 U.S.C.A. § 702. In addition, the Plaintiffs seek injunctive and declaratory relief, set forth in Count Six, under the Declaratory Judgment Act, 28 U.S.C.A. §§ 2201-02, and the All Writs Act, 28 U.S.C.A. § 1651. The Plaintiffs have conceded to dismissal of Count Four, Unjust Enrichment. (Pl. Mem. in Opp., p. 45, n. 19.)

The Tucker Act provides that the district courts shall have jurisdiction over any "civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C.A. § 1346(a)(2).[1] In the present matter, the Plaintiffs seek monetary damages for breach of contract, breach of implied contract, and for unlawful taking under the Fifth Amendment.

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[1] As the Tucker Act waives sovereign immunity only for claims "against the United States," the Plaintiffs' claims under the Tucker Act may not proceed against DOE or the Secretary of the Treasury of the United States.

C. Count One: Breach of Contract

The Tucker Act provides a basis for jurisdiction in the district courts for breach of contract claims under $10,000. 28 U.S.C.A. § 1346(a)(2). *Ysasi v. Rivkind,* 856 F.2d 1520, 1525 (Fed. Cir. 1988). The Tucker Act also extends its grant of jurisdiction to claims brought by plaintiffs who are not named parties to, but rather are intended third party beneficiaries of government contracts. *Carlow v. United States,* 40 Fed. Cl. 773, 779 (Fed. Cl. 1998). In the present matter, the Plaintiffs claim that they are intended third party beneficiaries of the NSP Standard Contract.

1. Third Party Beneficiaries

The test for determining an intended third party beneficiary status is that the contract must reflect the express or implied intention of the parties to benefit the third party. *Montana v. United States,* 124 F.3d 1269, 1273 (Fed. Cir. 1997). The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefitted thereby. *Montana,* 124 F.3d at 1273. The test is premised upon the decision of the United States Supreme Court, which held that "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. *Carlow,* 40 Fed. Cl. at 781, quoting *German Alliance Ins. Co. v. Home Water Supply Co.,* 226 U.S. 220, 230, 33 S.Ct. 32, 35, 57 L.Ed. 195 (1912).

When construing the intended benefit pursuant to a contract based on a federal statute, the court should look to the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations. *See Busby School of Northern Cheyenne Tribe v. U.S.*, 8 Cl.Ct. 596, 602 (Cl. Ct. 1985) ("the plaintiffs in question may very well be able to show they were intended third-party beneficiaries of the contracts between the School Board and the BIA given the pertinent statutes and regulations and the underlying policy behind the contracts and applicable statutes and regulations").

In the present matter, not only is the NSP Standard Contract itself lacking in any mention of ratepayers such as the Plaintiffs, but the statute and regulations in question are similarly devoid of any reference to ratepayers as an intended beneficiary. Instead, the NSP Standard Contract and the NWPA, with its accompanying regulations, refer only to intended obligations and benefits between DOE and the owners and generators of spent nuclear fuel, and to an intention to benefit and protect the general public welfare and the environment.

The NWPA contains an explicit statement of its purposes. 42 U.S.C .A. § 10131(b). Included in its purposes is "a reasonable assurance that *the public and the environment* will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel . . . ." 42 U.S.C.A. § 10131(b)(1) (emphasis added). The NWPA further specifies that "the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel." 42 U.S.C.A. § 10131(a)(4).

In accordance with its purposes, the NWPA authorized DOE "to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel," such as NSP. 42 U.S.C.A. § 10222(a). The NWPA further authorized DOE to establish procedures for the collection and payment of fees from the generators and owners of the spent nuclear fuel. 42 U.S.C.A. § 10222(a)(4). The NWPA does not authorize DOE to contract with ratepayers such as the Plaintiffs in any capacity.

The funds at issue in the present matter, contained in the NWF, are explicitly described in the NWPA as being "composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel."42 U .S.C.A. §§ 10131(b)(4). The NWPA specified that the fees and funds at issue are generated from utilities such as NSP, not from ratepayers such as the Plaintiffs.

In summary, the purpose of the NWPA is explicitly set forth as an intent to benefit and protect the public welfare and the environment. The NWPA and the corresponding regulations consistently and explicitly emphasize that the NWF fees will be paid by and the full costs of disposal will be borne by the owners and generators of the spent nuclear fuel. Ratepayers, such as the Plaintiffs, are not referenced in the statute or its accompanying regulations, either in regard to the benefits or the obligations contained in the NWPA.

Similarly, the NSP Standard Contract, entered into pursuant to the NWPA, is explicitly between DOE and NSP only; the ratepayers are not referenced, either in regards to the benefits or the obligations at issue. The preamble of the NSP Standard Contract reads as follows:

> Whereas, the DOE has the responsibility for the disposal of spent nuclear fuel and high-level radioactive waste of domestic origin from civilian nuclear power reactors *in order to protect the public health and safety, and the environment;*
>
> . . .
>
> Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste;
>
> . . . .

(NSP Standard Contract, p. 1.)

The NSP Standard Contract sets forth, in Article VIII, that NSP, as "Purchaser," is required to pay DOE a fee of 1.0 mill per kWh on electricity. The NSP Standard Contract charges fees only to NSP and to no other person or entity. In exchange for payment of the fee, Article IV sets forth that DOE will accept title to NSP's spent nuclear fuel.

Finally Section XXII of the NSP Standard Contract contains an integration clause, which states that the

contract "contains the entire agreements between the parties with respect to the subject matter hereof. Any representation, promise, or condition not incorporated in this contract shall not be binding on either party. No course of dealing or usage of trade or course of performance shall be relevant to explain or supplement any provision contained in this contract."

Neither the NWPA nor the NSP Standard Contract reflects the express or implied intention to benefit the ratepayers as third parties. Rather, the statute and the contract explicitly contemplate that the parties' mutual obligations were entered into so as to benefit the general public as a whole.

The Plaintiffs cite to the legislative history in an attempt to create a question as to Congress' intent to benefit the ratepayers. However, where the resolution of a question of federal law turns on a statute and the intention of Congress, the court must first look to the statutory language. *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200, 115 L.Ed.2d 145 (1991). The court will then look to the legislative history if the statutory language is unclear; however, if the statutory language is not unclear, there is no need to look at the legislative history. *Toibb*, 501 U.S. at 162, 111 S.Ct. at 2200. The Court has looked to the explicit language of the NWPA and has found no such intention to benefit the ratepayers specifically. There is consequently no need to look at legislative history so as to create an ambiguity that does not otherwise exist.

Similarly, the Plaintiffs also cite to public statements by NSP in an attempt to create a question

about the parties' intent to benefit ratepayers under the NSP Standard Contract. However, a court's interpretation of a contract begins with the contract's plain language. *McAbee Construction, Inc. v. United States,* 97 F .3d 1431, 1435 (8th Cir. 1996). If the provisions are clear and unambiguous, they must be given their plain and ordinary meaning, and the court may not resort to extrinsic evidence to interpret them. *McAbee,* 97 F.3d at 1435. Extrinsic evidence will not be received to change the terms of a contract that is clear on its face. *McAbee,* 97 F.3d at 1435, quoting *Beta Sys., Inc. v. United States,* 838 F.2d 1179, 1183 (Fed. Cir. 1988). The Court examined the language of the NSP Standard Contract and found no ambiguity that would require the introduction of extrinsic evidence. The Plaintiffs were not intended third party beneficiaries of the NSP Standard Contract.

As discussed above, the general rule for determining whether a plaintiff is an intended third party beneficiary is whether the contract reflects the express or implied intention of the parties to benefit the third party. *Montana,* 124 F.3d at 1273. However, under certain limited circumstances, the third party beneficiary test has a second prong.[2] *Schuerman v. U.S.,* 30 Fed. Cl. 420, 430 (Fed. Cl. 1994); *Montana,* 124 F.3d at 1273, n. 6. The second prong of the third party beneficiary test applies in cases in which members of the public bring suit against promisors who contract with the government to render a public

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[2] The second prong was rejected as per se requirement of third party beneficiary status, and currently only applies under limited circumstances. *Carlow,* 40 Fed. Cl. at 781; *Schuerman,* 30 Fed. Cl. at 430; *Montana,* 124 F.3d at 1273, n. 6.

service or, in other words, in cases of general government contracts benefitting the public at large. *Schuerman,* 30 Fed. Cl. at 430; *Montana,* 124 F.3d at 1273, n. 6. In such cases, the third party beneficiary test requires direct evidence in the contract that the contracting parties intended to give the third party an enforceable right to sue for compensation. *Schuerman,* 30 Fed. Cl. at 430; *Montana,* 124 F.3d at 1273, n. 6.

In the present matter, the NSP Standard Contract is a government contract benefitting the public at large, as discussed above. Therefore, the second prong of the third party beneficiary test applies. The NSP Standard Contract must contain direct evidence that NSP and DOE intended to give the Plaintiff ratepayers an enforceable right to sue for compensation. There can be no question that the Plaintiffs fail to meet this test as a matter of law.

The Plaintiffs fail to meet either prong of the third party beneficiary test as a matter of law. Therefore, regardless of whether one or both prongs of the test are applied, the Plaintiffs are not third party beneficiaries of the NSP Standard Contract.

The Plaintiffs consequently fail to state a claim for breach of contract. In addition, because the Plaintiffs cannot sue under the NSP Standard Contract, there is no jurisdiction for breach of contract under the Tucker Act. Therefore, this Court does not have subject matter jurisdiction over the Plaintiffs' breach of contract claim and the claim must be dismissed.

2. Exhaustion of Administrative Remedies

In the alternative, the Plaintiffs' breach of contract claim must also be dismissed for failure to exhaust administrative remedies. The Plaintiffs allege that they are third party beneficiaries under the NSP Standard Contract. (Complaint at ¶ 65.) The Court has already found that the Plaintiffs' allegation is erroneous as a matter of law. However, even if the Plaintiffs were third party beneficiaries under the Standard Contract, this Court would have to dismiss their claim of breach of contract for failure to exhaust administrative remedies.

A third party beneficiary is bound by the terms of the contract and is subject to the same defenses as the original party would be. *Robbins v. Prosser's Moving and Storage Co.,* 700 F.2d 433, 436 (8th Cir. 1983). In the present matter, Article XVI of the NSP Standard Contract provides that "any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer," whose decision shall be final and conclusive unless appealed to the DOE Board of Contract Appeals within 90 days. (NSP Standard Contract, p. 27; 10 C.F.R. § 961.11, Article XVI.)

The Court of Federal Claims cited to this language in the NSP Standard Contract in dismissing NSP's lawsuit against the United States; the Court held that NSP was required to pursue its claims through the administrative remedies established in the NSP Standard Contract. *Northern States Power Co. v. United States,* 43 Fed. Cl. at 382, 388. As a third party beneficiary, the Plaintiffs would be subject to the same

defense in this lawsuit. Therefore, even if the Plaintiffs' claim of third party beneficiaries status under the NSP Standard Contract was not erroneous as a matter of law, their breach of contract claim would still have to be dismissed for failure to exhaust administrative remedies.

C. Count Two: Breach of Implied Contract

In Count Two, the Plaintiffs allege that they are parties to an implied contract with DOE pursuant to the 1.0 mill per kWh fee paid into the NWF. (Complaint at ¶ 67.) In their Response Brief, the Plaintiffs specified that their breach of implied contract claim is based upon an implied-in-fact contract theory, and they are not pursuing their claim based upon an implied-in-law contract theory. (Pl. Mem. in Opp., p. 45, n. 19.) However, the Plaintiffs cannot set forth an entitlement to relief as a matter of law.

First, the existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract. *Atlas Corp. v. United States,* 895 F.2d 745, 754 (Fed. Cir. 1990), *cert. denied,* 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22, citing *ITT Fed. Support Services v. United States,* 531 F .2d 522, 528, n. 12, 209 Ct. Cl. 157 (1976). In the present matter, the rights and duties in question, specifically, the payment of fees to DOE and DOE's corresponding obligation to accept spent nuclear fuel, are explicitly set forth in the NSP Standard Contract. Because the NSP Standard Contract already encompasses the subject matter of the Plaintiffs'

claims, the Plaintiffs' breach of implied contract cause of action fails to state a claim as a matter of law.

In the alternative, the Plaintiffs cannot establish the elements of an implied contract as a matter of law. An implied-in-fact contract is one founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding. *Lewis v. United States,* 70 F.3d 597, 600 (Fed. Cir. 1995), quoting *Baltimore & Ohio R.R. Co. v. United States,* 261 U.S. 592, 597, 43 S.Ct. 425, 426-27, 67 L.Ed. 816 (1923). Like an express contract, an implied-in-fact contract requires: (1) mutuality of intent to contract; (2) consideration; and (3) lack of ambiguity in offer and acceptance. *Lewis,* 70 F.3d at 600, quoting *City of El Centro v. United States,* 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied,* 501 U.S. 1230, 111 S.Ct. 2851, 115 L.Ed.2d 1019. When the United States is a party, a fourth requirement is added: the government representative whose conduct is relied upon must have actual authority to bind the government in contract. *Lewis,* 70 F.3d at 600, quoting *City of El Centro,* 922 F.2d at 820.

In the present matter, the Plaintiffs have failed to allege mutuality of intent to contract and lack of ambiguity in offer and acceptance. Rather, the Plaintiffs' Complaint, including the NSP Standard Contract, and the NWPA establish that DOE and NSP contracted with each other for NSP's payment of fees to DOE in exchange for DOE's disposal of spent nuclear fuel.

In addition, the Plaintiffs cannot as a matter of law satisfy the fourth required element of an implied-in-fact, that of actual authority by the government representative in question. The NWPA authorized DOE to contract "with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, ..." 42 U.S.C.A. § 10222(a)(1). DOE thus had actual authority to enter into contracts with utilities such as NSP. The Plaintiffs cannot as a matter of law establish that DOE had actual authority to contract with ratepayers such as the Plaintiffs for the disposal of spent nuclear fuel. The Plaintiffs' inability to establish actual authority to contract by DOE serves as an insuperable bar to relief in the present matter.

Count Two, breach of implied contract, thus fails to state a claim as a matter of law. Furthermore, without the existence of an implied contract, this Court lacks subject matter jurisdiction under the Tucker Act. Count Two must consequently be dismissed.

D. Count Three and Count Five: Taking and Violation of Due Process

In Count Three, the Plaintiffs assert that "DOE's actions constitute a taking without just compensation, and therefore compensation is available under the Tucker Act, ..." (Complaint at ¶ 69.) However, the Tucker Act is only a jurisdictional statute; it does not create any substantive rights. *Tippett v. United States,* 185 F.3d 1250, 1254 (Fed. Cir. 1999), citing *United States v. Testan,* 424 U.S. 392, 398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976).

In Count Five, the Plaintiffs' assert that "DOE's actions constitute a taking of plaintiffs' and putative class members' property without due process of law, ..." pursuant to the Fifth Amendment. (Complaint at ¶ 73.) Therefore, the Court will assume that the Plaintiffs intend to assert both a due process and a taking claim under the Fifth Amendment.

1. Taking under the Fifth Amendment

Pursuant to a taking claim under the Fifth Amendment, a plaintiff must initially show standing. *Maniere v. United States,* 31 Fed. Cl. 410, 420 (Fed. Cl. 1994). Standing is the constitutional requirement, imposed by the "cases or controversies" provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit. *Ben Oehrleins v. Hennepin County,* 115 F.3d 1372, 1378 (8th Cir. 1997).

To establish standing pursuant to a taking claim, the plaintiff must show proof of personal injury, that is, the requisite interest in the property at issue and the deprivation thereof by the United States. *Maniere,* 31 Fed. Cl. at 420. Accordingly, to demonstrate the requisite interest in the property at issue, the plaintiff must demonstrate ownership of the property at the time of the taking. *Maniere,* 31 Fed. Cl. at 420. If the plaintiff fails to establish this most basic requirement of the personal injury component of the standing analysis, a court need not progress to the other considerations of standing. *Maniere,* 31 Fed. Cl. at 420.

The Plaintiffs cannot demonstrate ownership of the property at issue, which are the fees that NSP paid

into the NWF, and thus have no standing to pursue a taking claim. The Plaintiffs concede that they simply paid their monthly electricity bills. Revenue paid by the customers for service belongs to the company. *Board of Public Utility v. New York Telephone Co.*, 271 U.S. 23, 31, 46 S.Ct. 363, 366, 70 L.Ed. 808 (1926). By paying bills for service, customers do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. *Board of Public Utility,* 271 U.S. at 32, 46 S.Ct. 366. The Plaintiffs in the present matter pay a fee for utility service, including the storage and disposal of spent nuclear fuel. The Plaintiffs thus do not retain an interest in the fee after it is paid to NSP. The Plaintiffs therefore lack standing to assert a taking claim. *See also Ben Oehrleins,* 115 F.3d at 1379-81 (no standing for customers based upon paying the fees in question through passed-on costs).

The Plaintiffs respond in the present matter by arguing that the fees paid into the NWF are not merely passed on to customers through increased utility bills, but rather, "the Plaintiffs here actually pay the fees in question to the United States, albeit *through the agency* of NSP. (Pl. Mem. in Opp., p. 25 (emphasis added).) The Plaintiffs thus argue that "NSP effectively acted as DOE's agent with respect to collection of the NWF fees." (Pl. Mem. in Opp., p. 51.) The Plaintiffs argue that "NSP had *apparent authority* to act as DOE's agent." (Pl. Mem. in Opp., p. 51 (emphasis added).)

However, "[i]t is well established that the government is not bound by the acts of its agents beyond the scope of their *actual authority*."

Harbert / Lummus Agrifuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998) (emphasis added), citing *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384, 68 S.Ct. 1, 3, 92 L.Ed. 10 (1947). The Plaintiffs do not allege, and cannot as a matter of law establish, that NSP had actual authority to collect fees as DOE's agent.

Therefore, because the Plaintiffs cannot establish that they had the required ownership interest in the fees at the time that they were collected by DOE into the NWF, the Plaintiffs have no standing to pursue their takings claim.

In the alternative, even if the Plaintiffs had standing to pursue a taking claim based upon the NSP's payment of fees into the NWF, the Plaintiffs' taking claim would still be barred.

A compensable taking arises only if the government action in question is authorized. *Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1362 (Fed. Cir. 1998), citing *United States v. North Am. Transp. & Trading Co.,* 253 U.S. 330, 333, 40 S.Ct. 518, 64 L.Ed. 935 (1920). If the government action is unauthorized, the acts of the government's officers may be enjoinable, but they do not constitute the basis of a taking claim. *Del-Rio,* 146 F.3d at 1362. The principle underlying this rule is that when a government official engages in ultra vires conduct, the official will not, in any legal or constitutional sense, represent the United States, and what the official does or omits to do, without the *authority of Congress,* cannot create a claim against the government founded upon the Constitution. *Del-rio,* 146 F.3d at 1362

(emphasis added), citing *Hooe v. United States,* 218 U.S. 322, 31 S.Ct. 85, 54 L.Ed. 1055 (1910).

In the present matter, the NWPA authorized DOE to contract with NSP for the disposal of spent nuclear fuel in exchange for NSP's payment of fees. 42 U.S.C.A. § 10222(a)(1). DOE had no such "authority of Congress" to take any such fees from the Plaintiffs. Therefore, in the absence of the required "authority of Congress," the DOE's collection of fees from the Plaintiffs would be ultra vires, and thus could not form the basis of a taking claim.

2. Due Process

In Count Five, the Plaintiffs allege that the assessment of fees violates due process under the Fifth Amendment. (Complaint at ¶ 73 .) However, the due process clause of the Constitution is not a money-mandating provision such as is required for jurisdiction to lie under the Tucker Act. *Golden Pacific Bankcorp v. United States,* 15 F.3d 1066, 1076 (Fed. Cir. 1994). The Plaintiffs concede that their due process claim is not cognizable under the Tucker Act. (Pl. Mem. in Opp., pp. 53-54.)

The Plaintiffs seek instead to pursue their due process claim under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C.A. § 702, which was not pled in their Complaint. The Plaintiffs thus move the Court to allow them to amend their Complaint accordingly.

However, the Plaintiffs' due process allegation otherwise fails to state a claim for relief. The due

process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 789, 100 S.Ct. 2467, 2476, 65 L.Ed.2d 506 (1980). The provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. *O'Bannon,* 447 U.S. at 789, 100 S.Ct. at 2476. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. *O'Bannon,* 447 U.S. at 789, 100 S.Ct. at 2476.

As the Court addressed earlier, the government did not directly appropriate any funds from the Plaintiffs, only from NSP. Any allegation by the Plaintiffs that DOE directly assessed fees against the Plaintiffs is erroneous as a matter of law. Therefore, the Plaintiffs' allegations fail to state a claim for violation of due process.

In addition, as the second element of a due process claim, after demonstrating that the plaintiff has a protected liberty or property interest at stake, the plaintiff must prove that the defendant deprived him or her of such an interest without due process of law. *Gordon v. Hansen,* 168 F.2d 1109, 1114 (8th Cir. 1999). Due process requires adequate notice and an opportunity to be beard at a meaningful time and in a meaningful manner. *Marler v. Missouri State Board of Optometry,* 102 F.3d 1453, 1456 (8th Cir. 1996), quoting *Post v. Harper,* 980 F.2d 491, 493 (8th Cir. 1992). In the present matter, the Plaintiffs have not alleged that the government deprived them of notice or an opportunity to be heard. Thus the Plaintiffs have not set forth a

claim that they were deprived of due process of law under the Fifth Amendment.

Finally, it is well established that a simple breach of contract does not rise to the level of a constitutional deprivation. *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 446 (8th Cir. 1995) (due process claim under § 1983 and Fourteenth Amendment). In the present matter, the Plaintiffs' due process allegation is based upon DOE's breach of the NSP Standard Contract. The Plaintiffs have alleged no additional facts that would give rise to a due process claim. The Plaintiffs' allegation therefore does not state a claim for a violation of due process.

For the above reasons, the Plaintiffs' allegations are insufficient to set forth a claim either for taking or for violation of due process under the Fifth Amendment. Therefore, Count Three and Count Five must be dismissed as a matter of law.[3]

3. Statute of Limitations

In the alternative, even if the Plaintiffs' taking and due process allegations stated a claim for relief, the Plaintiffs' claims would still be barred by the statute of limitations.

The NWPA contains a statute of limitations as follows:

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[3] The Plaintiffs' motion to amend the Complaint to plead their due process claim under the APA is consequently denied as moot and untimely.

> A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

42 U.S.C.A. § 10139(c).

Subsection (a)(1), as referenced above, includes any civil action "challenging the constitutionality of any decision made, or action taken, under any provision of this part." 42 U.S.C.A. § 10139(a)(1)(C).[4] In Count Three and Count Five, the Plaintiffs allege that DOE's collection of fees pursuant to the NWPA, 42 U.S.C.A. § 10222(a), constitutes a taking and a violation of due process under the Fifth Amendment, in the context of DOE's failure to fulfill its corresponding obligation to begin accepting spent nuclear fuel by January 31, 1998.

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[4] The statute also provides that the United States courts of appeals shall have original and exclusive jurisdiction over any such action. 42 U.S.C.A. § 10139(a)(1). The provision thereby provides an additional and distinct basis for the Court's conclusion that it lacks subject matter jurisdiction over the present matter.

Therefore, as the Plaintiffs seek to challenge the constitutionality of DOE's action taken under the NWPA, the Plaintiffs' claims are subject to the 180 day statute of limitations set forth above. DOE failed to fulfill its obligation to begin accepting spent nuclear fuel by January 31, 1998. (Complaint at ¶ 40.) The Plaintiffs commenced the present action on August 7, 1998, thereby filing their action after the limitations period had run.

E. Count Four: Unjust Enrichment

A claim for unjust enrichment essentially states a claim for breach of an implied-in-law contract. *Nematollahi v. United States,* 38 Fed. Cl. 224, 235 (Fed. Cl. 1997), citing *Trauma Serv. Group, Ltd. v. United States,* 33 Fed. Cl. 426, 432 (Fed. Cl. 1995), *aff'd,* 104 F.3d 1321 (Fed. Cir. 1997). However, jurisdiction under the Tucker Act extends only to contracts either express or implied in fact, and not to claims on contracts implied in law. *Hercules, Inc. v. United States,* 516 U.S. 417, 423, 116 S.Ct. 981, 985, 134 L.Ed.2d 47 (1996), citing *Sutton v. United States,* 256 U.S. 575, 581, 41 S.Ct. 563, 565-66, 65 L.Ed. 1099 (1921).

Therefore, the Court lacks subject matter jurisdiction over the Plaintiffs' claim of unjust enrichment, and Count Four must be dismissed. The Plaintiffs conceded that they are not pursing their claim of unjust enrichment. (Pl. Mem. in Opp., p. 45, n. 19.)

F. Count Six: Declaration of Utility's Interest

In Count Six, the Plaintiffs seek a declaration that NSP has no title to the funds it has collected from the Plaintiffs and an injunction against further collections. (Complaint at ¶ 75.) The Tucker Act, however, does not confer equity jurisdiction. *United States v. Woodall,* 12 F.3d 791, 793 (8th Cir. 1993), citing *United States v. Testan,* 424 U.S. 392, 397-98, 96 S.Ct. 948, 952-53, 47 L.Ed.2d 114 (1976). The Plaintiffs concede that the Tucker Act does not waive sovereign immunity for their claims for equitable relief. (Pl. Mem. in Opp., pp. 67-68.) Instead, the Plaintiffs seek to proceed under the Declaratory Judgment Act, 28 U.S.C.A. § 2201-2202, and the All Writs Act, 28 U.S.C.A. § 1651, and seek to amend their Complaint to proceed under the APA, 5 U.S.C.A. § 702.

First, to the extent that the Plaintiffs seek a declaration that NSP has no title to the funds it collects from the Plaintiffs, the Court has already found that the Plaintiffs' allegation is erroneous as a matter of law. As previously addressed, revenue paid by the customers for service belongs to the company, and by merely paying their utility bills, customers do not acquire any interest in the funds of the company. *Board of Public Utility,* 271 U.S. at 32, 46 S.Ct. at 366. When the Plaintiffs in the present matter pay their fees for utility service, including a fee for the storage and disposal of spent nuclear fuel, that fee then becomes the property of NSP, and the Plaintiffs no longer retain an interest in the fee after it is paid to NSP. To the extent that the Plaintiffs seek a declaration regarding title to funds in the NWF, on the other hand, the Plaintiffs have no standing to seek

such a declaration and the Court has no jurisdiction over the subject matter, as previously discussed.

Secondly, to the extent that the Plaintiffs seek an "injunction against further collections," the Plaintiffs' claim must also be dismissed as a matter of law. There are two collections at issue in the present matter. First, NSP collects the fee from the Plaintiffs; second, DOE collects the fee from NSP.

To the extent that the Plaintiffs seek an injunction against the future collection of the fee in question by NSP, that claim may not proceed. As a preliminary matter, the Plaintiffs concede that they do not allege any wrongdoing by NSP and do not seek any recovery against NSP, but have merely named NSP as a Nominal Defendant. Nevertheless, to the extent that the Plaintiffs seek an injunction against NSP, the bar to that claim is discussed in further detail below.

In addition, the Plaintiffs cannot maintain an action for an injunction against the future assessment of fees by DOE, again, for reasons previously addressed in this Order. The Declaratory Judgment Act may allow individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71, n. 15, 98 S.Ct. 2620, 2629, n. 15, 57 L.Ed.2d 595 (1978). However, as previously addressed, the Plaintiffs cannot maintain this claim against DOE in the present matter. First, the Plaintiffs lack standing because, as previously discussed, DOE does not assess the fee in question against the Plaintiffs.

DOE collects the fee in question from NSP only, pursuant to the NSP Standard Contract and the NWPA. Furthermore, as previously addressed in detail, the assessment of the fee in question does not constitute a taking under the Fifth Amendment.

Finally, the federal courts' power to exercise jurisdiction over declaratory judgment actions is discretionary. *Aetna Cas. and Sur. v. Jefferson Trust and Sav.*, 993 F.2d 1363, 1366 (8th Cir. 1993), citing *State Farm Mut. Auto. Ins. Co. v. Bonwell*, 248 F.2d 862, 865 (8th Cir. 1957). The Declaratory Judgment Act was an authorization, not a command; it gave the federal courts competence to make a declaration of rights, but it did not impose a duty to do so. *Public Affairs Assoc., Inc. v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 582 7 L.Ed.2d 604 (1962).

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. *Rickover*, 369 U.S. at 112, 82 S.Ct. at 582. For the reasons stated above regarding the Court's jurisdiction, sovereign immunity, and the Plaintiffs' failure to otherwise state a claim, to the extent that the Court's power to exercise jurisdiction under the Declaratory Judgment Act is discretionary, the Court would otherwise decline to exercise jurisdiction in the present matter.

G. Filed Rate Doctrine and Primary Jurisdiction

In the alternative, to the extent that the Plaintiffs seek a refund or an injunction against the further

collection of the fee in question by NSP, the Plaintiffs claims are barred by the filed rate doctrine and the doctrine of primary jurisdiction.

NSP is a "public utility," as defined in Minn. Stat. § 216B.02, subd. 4. Accordingly, NSP may only charge rates that have been approved by the MPUC, pursuant to Minn. Stat. §§ 216B.03 and 216B.16. A "rate" is defined as "every compensation, charge, fare, toll, tariff, rental and classification, or any of them, demanded, observed, charged, or collected by an public utility for any service and any rules, practices, or contracts affecting any such compensation, charge, fare, toll rental, tariff, or classification." Minn. Stat. § 216B.02, subd. 5.

The filed rate doctrine "has its genesis in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-252, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951)." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962, 106 S.Ct. 2349, 2354-55, 90 L.Ed.2d 943 (1986). In *Montana-Dakota*, the Supreme Court held that the plaintiff, who had argued that the utility's rates were fraudulent and unlawful, "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, ..." *Montana-Dakota*, 341 U.S. at 251, 71 S.Ct. at 695. Ultimately, the Supreme Court held as follows:

> We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its

> opinion, it is the only or the more reasonable one.

Montana-Dakota, 341 U.S. at 251-52, 71 S.Ct. at 695.

The Eighth Circuit applied the filed rate doctrine in 1992, in *H.J. Inc. v. Northwestern Bell Telephone Co.,* 954 F.2d 485 (8th Cir. 1992). In an action brought by customers against a telephone company, the Eighth Circuit affirmed the district court's dismissal, holding that the claims "necessarily and plainly challenge the rates previously approved by the Commission," and were thereby barred by the filed rate doctrine. *H.J. Inc,* 954 F.2d at 493.

The Plaintiffs claims are similarly barred in the present action. To the extent that the Plaintiffs seek a refund of any fee paid to NSP, and/or to the extent that the Plaintiffs seek an injunction against the further collection of any fee by NSP, the Plaintiffs claims are barred by the filed rate doctrine.

In the alternative, the primary jurisdiction doctrine will bar the Plaintiffs' claims. The primary jurisdiction doctrine is utilized to coordinate judicial and administrative decision making. *Access Telecommunications v. Southwestern Bell Telephone Co.,* 137 F.3d 605, 608 (8th Cir. 1998). The doctrine comes into play whenever enforcement of the claim at issue requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *Atlantis Express, Inc. v. Standard Transportation Services, Inc.,* 955 F.2d 529, 532 (8th Cir. 1992), citing *United States v. Western Pac. R.R .,* 352 U.S. 59, 63-64, 77 S.Ct. 161,

164-65, 1 L.Ed.2d 126 (1956). There exists no fixed formula for determining whether to apply the doctrine of primary jurisdiction. *Access Telecommunications,* 137 F.3d at 608. Rather, in each case the question is whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created. *Access Telecommunications,* 137 F.3d at 608. These reasons include promotion of uniformity in statutory and regulatory construction and utilization of the agency's specialized knowledge. *Atlantis Express,* 955 F.2d at 532. Additionally, application of the doctrine is appropriate when policy considerations are at issue. *Atlantis Express,* 955 F.2d at 532-33.

The purposes behind the doctrine of primary jurisdiction are evident in the present matter. The matter implicates the utilization of a statutory and regulatory scheme so as to fund the permanent disposal of spent nuclear fuel. Deference to the MPUC in such a matter is appropriate.

Notwithstanding the primary jurisdiction doctrine, however, for all the reasons stated, the present matter may not proceed before this Court.

Conclusion

This lawsuit and related litigation around the nation have arisen pursuant to an unfortunate reality. Spent nuclear fuel exists and, notwithstanding DOE's obligations under the NWPA, no permanent repository has been built. However, the present lawsuit is not the appropriate remedy for the ill. The present lawsuit ignores the fact that spent nuclear fuel has already

been generated by NSP, and the funds that have been collected in the NWF are required to provide for permanent disposal.

NSP is currently responsible for the interim storage of the spent nuclear fuel; DOE remains responsible for its ultimate disposal. The Plaintiffs, however, have no such responsibility. If the putative class prevailed, the Plaintiffs would disgorge the NWF, but NSP and DOE would still be responsible for the spent nuclear fuel with no funds to provide for its disposal. A refund would therefore give rise to the need for future rate increases to finance the permanent disposal of the nuclear waste already produced, thus passing the cost on to future ratepayers.

Finally, the NSP Standard Contract pertains to the rights and obligations between NSP and DOE only. NSP pays its statutory fees into the NWF as a matter of law. The fact that NSP may fund this payment through a charge to the Plaintiffs' electricity bills neither affords this Court with jurisdiction over the present matter, nor entitles the Plaintiffs to the forms of relief they seek.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Federal Defendants' Motion to Dismiss (Doc. No. 43) is **GRANTED**.

2. NSP's Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. No. 42) is **GRANTED**.

3. The Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE**.

4. The Federal Defendants' Motion to Dismiss NSP's Crossclaim (Doc. No. 56) is **GRANTED**.

5. NSP's Crossclaim is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 23, 1999

/s/
DONOVAN W. FRANK
Judge of United States District Court

APPENDIX P

[p.2172]

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

[Dated April 13, 2004]

In the matter of the application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate	)
schedules governing the distribution	)
and supply of electric energy, implement	)
Power supply Cost Recovery plans,	)
factors and reconciliations in its rate	)
schedules for jurisdictional sales of	)
electricity and for miscellaneous	)
accounting authority and regulatory	)
asset recovery.	)
	)

Proceedings had in the above-entitled matter before Daniel E. Nickerson, Jr., J.D.,Administrative Law Judge, at the Michigan Public Service Commission, 6545 Mercantile Way, Lansing, Michigan.

SESSION OF TUESDAY, APRIL 13, 2004

VOLUME 13

APPEARANCES :

BRUCE R. MATERS, J.D.
JON CHRISTINIDIS, J.D.
RICHARD P. MIDDLETON, J.D.
MICHAEL J. SOLOCINSKI, JR., J.D.
The Detroit Edison Company
2000 Second Avenue, 688 WCB
Detroit, Michigan 48226

Appearing on behalf of The Detroit Edison Company

* * *

[p.2482]

JUDGE NICKERSON: Thank you, Ms. Royal.

MS. ROYAL: Thank you.

JUDGE NICKERSON: Mr. Keskey.

(Documents were marked Exhibits I-78 through I-80 by the reporter.)

JUDGE NICKERSON: On the record.

Mr. Keskey.

MR. KESKEY: Yes, your Honor. The Michigan Environmental Council and Public Interest Research Group in Michigan presents the direct testimony and

exhibits of Ronald C. Callen, which consists of a cover page and also 23 pages of questions and answers.

In addition, the witness sponsors three exhibits which have been marked as Exhibit I-78, Exhibit I-79 and Exhlbit I-80.

The corrections to the testimony would incorporate the exhibit numbers which appear in the testimony. On page 1, Exhibit RCC-1 would be Exhibit I-78.

On page 9 the reference to Exhibit RCC-2 would be I-79.

On page 21 the reference to Exhibit RCC-3 is Exhibit I-80.

Your Honor, we move that the testimony be bound into the record and we move the admission of both

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the testimony and Exhibits I-78, I-79 and I-80.

JUDGE NICKERSON: All right, thank you, Mr. Keskey.

Any objection to binding the direct testimony of Mr. "Kaylin" into the record?

MR. KESKEY: Callen.

JUDGE NICKERSON: Callen. I stand corrected, thank you -- Callen into the record.

It may be bound into the record.

Any objection to proposed Exhibits I-78 through I-80?

They are admitted.

- - -

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

Case No. U-13808

In the Matter of the Application of	)
THE DETROIT EDISON COMPANY	)
to increase rates, amend its rate	)
schedules governing the distribution	)
and supply of electric energy, implement	)
Power Supply Cost Recovery plans,	)
factors and reconciliations in its rate	)
schedules for jurisdictional sales of	)
electricity and for miscellaneous	)
accounting authority and regulatory	)
asset recovery.	)
	)

DIRECT TESTIMONY AND EXHIBITS OF RONALD C. CALLEN

On Behalf of
Michigan Environmental Council and
Public Interest Research Group in Michigan
March 5, 2004

[p.1]

I. QUALIFICATIONS

Q. Please state your name and business address.

A. My name is Ronald C. Callen.

Q. What is your professional address?

A. Clark Hill PLC, 2455 Woodland Circle, Okemos, Michigan 48864.

Q. What is your title?

A. Consultant and technical advisor under contract with the law firm of Clark Hill PLC, on behalf of the Michigan Environmental Council and the Public Interest Research Group in Michigan.

Q. What relevant experience have you had before this consulting role?

A. I served for about 25 years as a staff member of the MPSC mostly on electric issues and before that approximately 15 years as a physicist in the research and development of nuclear reactors. My qualifications are more specifically listed in Exhibit I-78 (RCC-I).

Q. With regard to the issues before you in this case, what were some of your responsibilities at the MPSC?

A. I was responsible for the investigation of the federal high-level nuclear waste program operated, according to law, by the U.S. Department of Energy ("DOE"). I prepared analyses of the formal long-range plans of the utilities for dealing with the federal program and the storage at reactor of spent fuel. I investigated the storage of spent nuclear fuel ("SNF") at each Michigan nuclear power plant, utility plans for continued storage at the plant

sites, utility actions to seek federal removal and utility plans for plant decommissioning including the relation between decommissioning and SNF storage. In addition, I advised the Commission on nuclear waste and nuclear power matters and represented the Commission and Staff at the National Association of Regulatory Utility

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Commissioner ("NARUC") meetings. With the assistance of another person, I issued a biennial statement of the payments made by U.S. ratepayers to the federal government for the cost of the federal waste disposal program. I helped form and was a Michigan representative to the Nuclear Waste Strategy Coalition ("'NWSC"), a group of commissions, utilities, and state attorneys general from over 20 states who worked together to assure that, ultimately, high level nuclear waste is disposed, and in a cost effective way. I served as technical expert to the Attorney General of Michigan for litigation in the U.S. Court of Appeals and an appeal to the U.S. Supreme Court; we represented over 50 state agencies from 35 states in seeking court relief to enforce the duties of the DOE to commence acceptance of SNF by the statutory deadline established in the Nuclear Waste Policy Act of 1982 ("NWPA").

Q. Have you worked in the area of nuclear energy or waste disposal before your Commission employment?

A. Yes, I have. After earning a Master's degree with a research thesis in nuclear physics, I worked on advanced nuclear reactor physics of fast neutron reactors as an experimenter determining power density and neutron flux parameters on a mock-up nuclear reactor, a critical experiment fueled with weapons grade enriched uranium. Later I became the Senior Physicist. In that capacity, I designed and analyzed experiments run for me in the facility by an operations crew. I also was officially qualified with the U.S. Atomic Energy Commission as an operator of the critical facility.

Q. Have you had further relevant experience?

A. Yes, after the experience I just mentioned, I served as a physics test experimenter for the Enrico Fermi I Fast Breeder Reactor. I conducted experiments designed to investigate the reactor power and nuclear core thermal and physics characteristics. I also assisted

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with the investigation of the fuel melting incident, its analysis and measures to prevent reoccurrence and on means to detect similar abnormalities. Later, I became Assistant Project Engineer in charge of the design and use of a new nuclear fuel for the Fermi. In that capacity, I was in charge of the development of the associated Environmental Impact Statement. Later, I was responsible for licensing following the end of the plant's operations and the conversion of the plant to decommissioned status.

Q. What have been related experiences in your duties at the Commission?

A. I have been an investigator of nuclear reactor operations, especially as to licensing matters subject to the authority of the U.S. Nuclear Regulatory Commission ("NRC") as well as with respect to the NRC's responsibility for review and licensing the federal effort to dispose of SNF. I also served as liaison between the MPSC and the NRC.

Q. With regard to nuclear waste disposal, what have been some of your relevant experiences?

A. I have participated in most of the investigation that this Commission and Staff have conducted in the last 20 years on this subject. For example, I have served as a member of the Governor's Advisory Task Force on High Level Nuclear Waste Disposal in 1975, and on at least two later governor's committees. I have served as an advisor and contributor to the Commission's deliberations leading to the formation of the NARUC program to investigate and correct the waste program by formation of its Nuclear Waste Disposal Subcommittee. I have been active in some of the development of a state low-level waste initiative. I served as NARUC Staff Subcommittee Chairman for many years and, for about ten years, as primary advisor to the Chairperson of the NARUC Subcommittee on Nuclear Waste Disposal and to the Chairperson of the NARUC Committee of Electricity. In a related area, I have had experience in the design, writing and review of

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environmental impact statements, both state and federal ones. I was responsible for the environmental review and support of the decision to approve certificates for pipelines by the Commission. I served as the Commerce Department's representative to the Michigan Interagency Environmental Review Committee and, for several years, chaired the Committee.

Q. What has been some of your experience at the national level with respect to nuclear waste disposal?

A. I helped design the NARUC Nuclear Waste Program Assessment Office in Washington, assisted in raising the funds for it and became its first Office Director, serving two years in Washington on loan from the MPSC. In that capacity, I investigated the federal program, and recommended action to the NARUC. I served as the NARUC's representative to the federal program, including meetings with the DOE, the NRC, the U.S. Nuclear Waste Technical Review Board ("TRB") and the U.S. Office of Technology Assessment ("OTA"). I also was a representative to workshops of the DOE on strategic issues, mission plan review and contingency planning.

In addition to my service for NARUC in Washington and with the Michigan Attorney General in litigation, I helped form under the aegis of the National Governors Association the first committee of state representatives to examine

federal action on nuclear waste disposal. I also created many statements for the NARUC Subcommittee delivered before Congressional committees and a national conference on nuclear waste disposal, and served as a Commission and NWSC representative to the U.S. Congress in support of corrective legislation. In this role, I have met with more than 50 Congressional members and/or their staffs, appeared before a number of federal and state bodies, attended many conferences and work study efforts, and have spoken at a number

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of them. Most recently, I helped set up the Wye River Dialogue on nuclear waste disposal for the Aspen Institute and served as one of Dialogue participants.

Q. What are some of the organizations you have spoken before?

A. They include the TRB, the Western Interstate Energy Board, the Governor's Advisory Committee of Vermont, the Radioactive Waste Review Board of the National Academy of Science, the National Conference of State Legislators, the National Conference on Radioactive Waste Transportation and the Decision Makers' Summit on Radioactive Waste Disposal.

Q. Have you been at nuclear facilities?

A. I have made repeated trips to all the nuclear power plants in Michigan. I have seen their storage pools

for SNF and the dry cask storage facility at Palisades. Several times, I have been to the Yucca Mountain site under investigation as the repository for SNF disposal and have been in the exploratory tunnel. I have been in a mine adjacent to and with the same geology as the Waste Isolation Pilot Plant near Carlsbad, New Mexico. I have been at the Argonne National Laboratory, both at Argonne IL and the reactor test area near Idaho Falls, Idaho and the Hanford Nuclear Facility of the DOE near Richland, Washington. I have visited the then-proposed site for SNF storage by the Mescalaro Apache Tribe in central New Mexico and the proposed site of the SNF storage facility by the Skull Valley Goshute Tribe in Utah. I have visited the low-level waste disposal facility at Hanford.

Q. Have you done research on this issue?

A. Yes. I have reviewed many reports, articles, and data over a long period of time and created an extensive library on the subject. In addition, I have conducted many

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interviews both in person, and by telephone. I have participated in workshops, conferences, and discussion groups.

Q. Have you written on this subject?

A. Yes, I have. I was the primary contributor to the original report to the Michigan Governor in 1975. I also issued summary assessments and

Congressional testimony for the NARUC and this Commission, in my role as Executive Director of the NARUC Washington Office. I issued a periodic newsletter on the waste program and authored a comprehensive analysis at the end of my Washington Office directorship. I have authored a paper for the National Academy of Sciences. Mike McCarthy, of the Minnesota Department of Public Service, and I prepared for the NWSC an analysis of the fundamental problems of the waste program, titled *Redesigning the U.S. High Level Nuclear Waste Disposal Program for Effective Management,* dated August 1994. I also authored a published article, entitled *Congress' Nuclear Waste Contract with America -Where Do We Go From Here?* which appeared in "The Electricity Journal."

Q. Have you made public presentations on nuclear waste issues?

A. Yes. In addition to those mentioned earlier, I have made presentations before the TRB, the DOE'S Strategic Principles Seminars, the National Academy of Sciences, the National Conference of State Legislators, the Western Interstate Energy Board, the annual nuclear waste program of the Institute for Nuclear Materials Management and, recently the Annual Forbes Conference on the Environment.

Q. Have you appeared as a witness in proceedings before the MPSC?

A. Yes. I have testified or filed comments in several MPSC dockets, and most recently, in U-11314, U-

12121, U-12613, U-12615, U-12725, and the consolidated electric

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restructuring cases, U-12649, U-12650. U-12651 and U-12652, concerning nuclear waste issues.

Q. Have you participated in other MPSC cases dealing with Act 304 or other electric matters?

A. Yes. As a MPSC staff member, I participated in cases in the 1980s and early 1990s dealing with various electric issues, and in particular Act 304. This not only included undertaking analysis in various cases and numerous assignments, but also participating as a witness in numerous Act 304 cases. These matters involved most cost and rate issues under Act 304 wholly aside from nuclear waste issues.

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II. Direct Testimony

Q. What is the purpose of your testimony in this proceeding?

A. My role in this case on behalf of the Michigan Environmental Council (MEC) and Public Interest Research Group in Michigan (PIRGIM) has been to study costs and rate issues relating specifically to spent nuclear fuel (SNF). My testimony presents the following key points: (a) Detroit Edison Company's (DECo's) power supply cost recovery

(PSCR) plan and five-year forecast are incomplete and insufficient because they fail to provide any explanation or detail to justify the recovery of spent nuclear fuel (SNF) fees, and related SNF storage or other costs, that are included but not adequately detailed in their filing; (b) DECo's request to include the SNF fee and other SNF costs in this PSCR plan case and forecast should be disallowed on the basis that DECo has failed to demonstrate it has been reasonable and prudent in incurring, mitigating, or minimizing SNF costs, (c) substantial costs and risks of SNF storage and disposal are presently placed totally upon the ratepayers, with utilities sharing little or none of these costs and risks; (d) the Commission should exercise its duty to investigate, review, and undertake action to protect ratepayers and the public interest relative to SNF cost incurrence; and (e) the Commission should consider and adopt a number of related remedies to so protect ratepayers and the public interest.

Q. Please provide explanation regarding the SNF costs and risks facing ratepayers.

A. There are basically four types of costs that DECo may incur for SNF storage and disposal: (1) through the federally assessed fee for disposal, currently one mill per kilowatt hour; (2) the cost of developing additional storage - both in storage pools and using dry storage casks; (3) for increased plant decommissioning costs due to the formerly unanticipated presence of SNF or increased SNF quantities on site at the end of

[p.9]

operational life; and (4) the cost of SNF disposal in the event the federal government never fulfills its obligations.

Q. Can you identify how large these costs might be for utilities, and for DECo specifically?

A. Yes, but not precisely for some of the four cost categories, and some cannot be quantified at all with today's knowledge. Cost category 1 (the fee) is known to date, and will continue to be assessed throughout the entire life of the plant. DECo has collected $95,804,704 in SNF fees as of the end of the third quarter of 2003 (Exhibit I-29, page 30, Answer to MEC/PIRGIM Discovery Question No. MEDE2.31295). DECo forecasts that its 2004 fee payments will be $7,947,182 Exhibit I-29, page 29, Answer to MEC/PIRGIM Question No. MEDE 2.21294). Another source, DOE financial reports obtained from the MPSC Staff, indicate a net payment by DECo of SNF fees through September 30,2003, of $93,868,820 (Exhibit I-79, page 2, RCC-2). Cost category 2 (SNF storage expansion) has and may become substantial. The total costs for these categories will depend substantially upon the date DOE accepts the SNF, if ever, and the number of years utilities continue to operate these facilities. Cost category 3 costs could be significant; certainly costs will also be incurred to someday decommission the SNF storage site also. Category 4 costs are simply unknown. I can reference that DOE's current estimated cost of the repository program, based upon success, is $59 billion. Were

that program to fail at some later date, and no public utility commission were to have taken any action, one can only speculate on the cost of an unknown process operated by unknown entities other than the federal government. I know of no study or insight anywhere of such future costs.

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Q. Can you offer any insight into overall at-reactor storage costs?

A. Several estimates have been made. The TRB quotes a range for the United States of $5 billion to $7 billion for all commercial nuclear storage costs. *Disposal and Storage of Spent Nuclear Fuel-Finding the Right Balance,* "U.S. Nuclear Waste Technical Review Board," March 1996. The NWSC estimates far more. *Nuclear Waste Program Update,* "Nuclear Waste Strategy Coalition," June 1999. Utilities in Michigan may incur many millions in these costs for its plant sites. For DECo, its estimate given in DECo's Strategic Plan for Fermi (Exhibit I-29, attachment 2) is that storage until the federal government finally removes all its SNF is $201 million (2001 dollars). This of course presumes success of the federal program and on a presumed schedule.

Q. Can you provide some specifics regarding SNF storage at DECo's Fermi plant?

A. Because DECo began Fermi 2 operation in 1985, SNF accumulation poses a storage problem as it does with all other U.S. commercial nuclear power

plants. DECo's responses to our discovery indicates that, including revisions to wet storage for SNF that occurred in 2001, storage capacity is 2942 cells (assemblies). As of October 2003, 1920 assemblies were in storage. DECo intends to again expand wet storage, in 2007. Each expansion is estimated to cost $5 million. In 2010, the company will begin dry storage, at an additional cost of $48.9 million (2001 dollars). Ultimately, 5372 assemblies will have been generated by the presumed end of plant life, 2025. DECo estimates that costs for SNF storage (until ultimate removal) at end of plant life will have cost $201 million. This estimate is based on presuming the DOE will begin SNF acceptance in 2015, and will begin accepting Fermi SNF in 2023. Thus, under these forecasts, when the plant operating license expires, the federal government will only have been removing SNF

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from the plant for two years. At that time, only 204 assemblies will have been removed and the remainder, 5168 assemblies - 96% of the lifetime SNF inventory - will still await federal removal from DECo's then shutdown facility.

It is also noteworthy that the DECo witness in Case U-12121 admitted that the company abandoned their assumed date for the federal government to begin SNF acceptance in 2010, in favor of a date of 2015. They continue to assume the 2015 date in the current case. Also, as admitted by DECo Witness Colonello in this case, SNF storage and handling costs are increased by the

delay in the federal program. In addition, costs are affected by the presumed rate at which the federal government will accept SNF, once it begins. Having been given no acceptance rate by the federal government, DECo has assumed the highest rate the federal government has estimated for SNF acceptance thus generating costs that may be too small.

Q. Please briefly describe the troubling history involving SNF disposal?

A. The federal commitment to provide high-level nuclear waste disposal was made in the 1950's as a part of their encouragement in the commercial development of nuclear power. The federal government has failed repeatedly to mount a successful disposal program having committed several times to the nation to open a repository. The dates of failed commitments include 1980, 1985 and 1989. The latest failure is in the NWPA, which the Congress created to "establish programs for the development of repositories for the safe permanent disposal of -- SNF", in which it labeled the previous failures as "seriously undermining the strength of the domestic nuclear industry" and as a "national failure". Even this time, the federal effort failed, in not meeting the NWPA mandated date, established in 1983, of 1998 for beginning SNF disposal. The federal failure means "(T)wenty-one years have now passed and the DOE still cannot state when, or if, a

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national SNF repository will be available". (Complaint, United States Court of Federal Claims, by Consolidated Edison Co of New York, Inc., p 8.)

Q. Hasn't the DOE given a date of 2010 for opening the repository?

A. Yes, but my analyses have shown that most knowledgeable experts have serious doubts that the DOE can meet that date. To meet 2010, the DOE must apply to the NRC for a license to build and operate the facility, and they appear unable to meet the near term date they have stated, 2004. Numerous review and technical agencies have concluded that the DOE cannot meet their own self-selected deadline for accepting SNF at the repository, because they cannot meet the corresponding 2004 deadline for an application for a license from the U.S. Nuclear Regulatory Commission (NRC). Agencies who have so concluded include the U.S. General Accounting Office, the U.S. Nuclear Waste Technical Review Board, the Advisory Committee on Nuclear Waste of the NRC, NRC Commissioner Edward Mattigan, and the nuclear industry's expert witness in the utility damages case against the federal government in the U.S. Court of Federal Claims. It should be remembered that the DOE selected 2010 itself, as a replacement after failing to meet 1998, the date mandated in the NWPA.

Q. Please provide more explanation concerning the inadequacy of DECo 's plan and forecast in this case?

A. While DECo has included in this plan and forecast case all costs related to the one mil per kilowatt hour SNF fee, and certain other undetailed SNF costs, DECo 's testimony and exhibits are devoid of any explanation concerning its handling of SNF issues and costs. Thus, there is no support for any finding that DECo has been reasonable and prudent with respect to said matters so as to support the recovery of the SNF costs. As an applicant in these proceedings, DECo has the burden to establish that the SNF costs for

[p.13]

which it seeks rate recovery are reasonable and prudent. Since DECo has failed to do so, the Commission should reject DECo 's PSCR plan and forecast. At a minimum, DECo should be required to refile a case that provides explanation concerning SNF costs and rate impacts if it seeks to recover these costs in rates.

Q. Please provide your reasons for concluding that the SNF fee and other costs should be disallowed for purposes of this case.

A. In addition to the total lack of support or explanation for the inclusion of SNF fee or other SNF costs in this case, as noted earlier, the costs sought to be included in this PSCR plan and forecast case should be disallowed on the basis that

DECo has not demonstrated it has been reasonable and prudent with respect to their incurrence and to undertake necessary or sufficient action to mitigate or minimize these costs, or to seek protection of the amounts represented by said costs. For example, DECo demonstrates acquiescence by failing to fully enforce its Standard Contract with DOE or to undertake other steps to protect both itself and its ratepayers with respect to the ongoing SNF fees that are being collected for a federal program which continues in default of its statutory and contractual duties. In this regard, the federal court decisions in the cases which were promoted and participated in by numerous states and state commissions, including *Indiana Michigan Power Company v Department of Energy,* 88 Fed 3rd 1272 (1996) and *Northern States Power Company v United State Department of Energy,* 128 Fed 3rd 754 (1997), found that the payment of the SNF fee was reciprocal to the duty of the Department of Energy (DOE) to commence acceptance of SNF by January 31, 1998. Of course, the Standard Contract also included this same reciprocal duty and provision. Since the duty to pay the fee was reciprocal to DOE'S duty to commence performance by January 31, 1998, and DOE has failed to perform its end of the bargain, it has not been demonstrated that the

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payment of the fee should continue unabated after January 31, 1998. At a minimum, any ongoing payments should be subject to protective terms and conditions. The utility should have undertaken self-help remedies, such as the institution of a utility

escrow, or sought to establish a court-supervised escrow to hold all of the SNF fees, pending a determination whether DOE would ever perform its disposal duties. DECo has failed to provide any explanation for its failure to undertake such actions.

Moreover, while DECo has pursued actions for damages in the U.S. Court of Claims seeking reimbursement of its additional costs resulting from the federal default, it does not request a refund of past SNF fees, or any protection or refund of present or future SNF fees, or if the federal government permanently fails to accept SNF for disposal. Thus, the SNF fees are totally unprotected. DECo has failed to explain why such action or any other action to protect the SNF fees has not been pursued.

DECo has provided no binding commitment to this Commission or to ratepayers that it would reimburse the ratepayers for any net recoveries obtained in the Court of Claims action, in recognition of the fact that all SNF costs have been paid by ratepayers through the years.

DECo has no contingent plan in the event the federal government never accepts SNF for disposal. Its plan shows it to continue to store SNF on site, all at ratepayer expense, and presumes federal success. This situation places great risks upon the ratepayers, thus absolving DECo, the generator and owner of the SNF, from these risks.

Given the lack of DECo 's explanation of its SNF costs or of actions to minimize SNF costs and risks, and to fully enforce its Standard Contract, there is no basis to justify recovery of the SNF costs in this case, at least pending a refiling of this case by DECo with respect to these matters. DECo's lack of explanation has occurred despite our

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extensive discovery questions to DECo seeking information regarding these issues, which DECo largely refused to answer (see Exhibit I-28).

Q. Please detail the amount of the disallowance that should be made in this case?

A. Based upon my review, it is my recommendation that DECo's final rate relief be reduced by at least $7,947,182, the amount of SNF fees that DECo expects to collect in rates in 2004.

Q. Why do you say that your disallowances recommended above is a minimum figure?

A. The amount of the rate reduction should actually be greater. This is because DECo is also including in its rates all SNF storage costs that DECo is incurring due to DOE's default in accepting SNF for disposal by January31, 1998. Due to DOE's default, DECo must expand its SNF storage capacity, and design and construct additional SNF storage capacity. All of these increased costs for additional SNF storage are included in DECo's rate requests, even though DECo should seek recovery

of costs resulting from federal delay from the federal government.

Q. Can you suggest how much might be at stake?

A. Yes, in its Court of Claims case, Indiana Michigan Power Company seeks about $108 million, presumably for the delay between 1998 and 2010 for its two reactors. DECo's damages will be in that ballpark, recognizing it has one reactor and it began operation some years later than Indiana's did. In addition, these amounts may be increased if, as expected, there is additional delay in federal SNF acceptance.

Q. Should the Commission implement an outright rate reduction for the cost of SNF fees and SNF storage costs resulting from DOE's default?

A. Yes. The Commission must protect ratepayers regarding all SNF fees and storage costs, and should commence a thorough ongoing investigation into all SNF and cost and rate

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issues. DECo can certainly make its own decision whether to continue to pay all SNF fees and storage costs, while at the same time it seeks relief against DOE in the courts. However, given the current situation, the Commission should protect ratepayers from paying all costs and financial risks resulting from the default in the DOE/ DECo contract, and thereby require the utility to take all steps to enforce its Contract without seeking a

pass-through of all costs to ratepayers. At the very least, DECo should agree to "collect but protect" remedies if it seeks continued recovery of these costs in rates

Q. Why do you believe that the Commission should require downward rate adjustments at this time?

A. DECo is the owner and generator of SNF. As such, it must share in the cost and financial risk that results from its generation of SNF, which results from its profitable electric sales to ratepayers. Moreover, ratepayers are at risk at paying multiple times for SNF fees, and storage or disposal costs, for a federal SNF disposal program that is in default. Clearly, SNF storage costs have been, are, and will be much higher than otherwise would exist if there had been DOE performance. Ratepayers are also at risk for paying increased decommissioning costs for the nuclear plant as a result of the delay and default. Ratepayers and perhaps taxpayers may also face the immense cost of effecting SNF storage or disposal in the event that both the utility and the federal government fail to dispose of SNF.

A downward rate adjustment to remove SNF costs is also appropriate because DECo failed to adequately enforce its contract over the years to ensure that DECo would receive the required performance under its contract with DOE. On discovery we attempted without success to obtain any additional information from DECo as to the actions it has undertaken to enforce its contract over the years. My own research

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indicates that DECo, by its actions and inactions, or omissions, has not undertaken adequate action on a sustained basis to ensure DOE's performance of its contract, despite all the knowledge of DOE's delays and failures.

Q. Do you have additional reasons for recommending a disallowance of SNF costs in this case?

A. Yes. Ratepayers are rendered wholly insecure as a result of the federal default. The Standard Contract was the subject of transactions between the nuclear utilities and the federal government only and did not involve the states, their regulatory commissions or ratepayers. The NWPA provides that the utilities who are the generators and owners of SNF are to pay the cost of SNF storage, pending any disposal. The NWPA does not assign the ratepayers the responsibility for said costs, but rather, preserves the regulatory authority of the state commissions to decide the ratemaking treatment of SNF costs.

By failing to adequately enforce its Standard Contract, by failing to undertake self-help remedies or court action to establish a utility escrow for SNF fee payments on and after January 31, 1998, DECo has essentially renegotiated its Standard Contract with the federal government to allow SNF fee payments to continue while DOE performance does not. In its filing, DECo presents no justification for concluding that the law or sensible regulatory policies require the SNF fee to be paid indefinitely,

while DOE performance is deferred indefinitely, contrary to the holding of the courts that the fee and federal performance were absolutely reciprocal.

[p.18]

Q. Please detail the reasons why the Commission should exercise its independent duty to investigate and review the SNF costs and rate issues presented, and to protect ratepayers and the public interest.

A. Compelling reasons exist for the Commission to invoke its independent duty to protect ratepayers in the public interest in this and other cases. The federal government has defaulted on its statutory and contractual duties under the NWPA and Standard Contract to commence acceptance of SNF for disposal by January 31, 1998. This default alone provides a strong basis for protective remedies or terms and conditions to protect ratepayers and the public interest, and to at least balance the interest of the utilities and ratepayers, pending resolution of SNF disposal.

While the utilities have a fiduciary duty to protect their stockholder interests, the Commission has been established and has been mandated to protect the ratepayers and public interest. Thus, the Commission must retain the independence to investigate and review these important issues. There is no other entity or regulatory authority that is empowered to do so on behalf of ratepayers.

Also, substantial risks exist that the federal government may never perform its SNF duties. This conclusion is formulated from DOE'S past poor track record in conducting the commercial disposal program and in handling nuclear waste storage and disposal programs generally; continuing uncertainties over Congressional appropriations for the Yucca Mountain disposal project; uncertainties resulting from extensive court litigation and the upcoming extremely complex NRC licensing process and appeals therein, which could significantly delay or dislodge the entire Yucca Mountain project. Moreover, over the years, progress on the project has been slowed by changing administrations, DOE Secretaries, and program directors, inadequate Congressional

[p.19]

funding, DOE struggles over program management, and shifting political climates. Clearly, program delay has and will result in added costs.[1] At the very least, the Commission should undertake remedies that would protect the ratepayers, while also protecting or balancing the utilities' interest.

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[1] For example, in a letter to U.S. Senate President Chaney, dated February 27,2004, Secretary of Energy Spencer Abraham announced disposal program delays "could mean additional costs of nearly a billion dollars per year for commercial utilities and federal defense nuclear waste sites to continue to provide temporary storage."

Q. Please provide or explain the potential remedies that the Commission should undertake in this case relative to SNF costs and rate issues.

A. First, as a primary remedy, the Commission should thoroughly investigate and review all pertinent issues concerning SNF cost and rate impacts. As an important tool in this effort, the Commission should establish annual filing and reporting requirements for DECo concerning all relevant issues involving SNF. The Commission should also require full explanation of all aspects of the SNF cost and rate impacts in its annual PSCR filings and forecast cases, and in all rate cases where appropriate. These filings should fully explain cost impacts, and forecasts, and specify the amount of said costs included in base rates and PSCR rates. The filing should also incorporate the explanation of all steps that the utility has and is undertaking to protect itself and its ratepayers.

The Commission should also disallow all SNF fees and other costs that DECo includes in this PSCR plan case and forecast case and require the company to refile its case with full explanation and justification regarding these matters.

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Q. Even if the Commission were to consider the unexplained SNF fee costs filed in this plan case, do you believe DECo correctly calculated the fee to be included in rates?

A. No, I do not. Based on a court decision utilities brought forward, nuclear facilities owe the one mill fee on net electric energy "generated and sold," not gross energy generated. That means gross generation and the fee should be reduced by a factor to account for in-plant usage and the same principle should apply to account for transmission or system losses. Consistent with, or analogous to, the Court's holding in *Wisconsin Electric Power Company v Department of Energy,* 778 Fed 2nd 1 (D.C. Cir. 1985), neither self-use energy nor transmission or system losses should be included in the calculated fee. In this case, for example, DECo forecasts system losses and company used energy at 6.7% (Exhibit A-18, Schedule J (page 1), as corrected at Tr 1149, also Exhibit A-16, Schedule F1-2, page 1). Thus, 6.7% of the Fermi generation represents Kwh's not "sold" resulting in a downward adjustment of $532,462.

Q. If the Commission should decide at this time not to adopt your recommendation to reduce rates for the SNF fee and other costs, do you have alternative or additional remedies the Commission should consider to protect ratepayers relative to SNF costs and rate impacts?

A. The primary remedy is a full and exhaustive investigation and review of all cost issues and rate impacts. Secondly, the Commission may consider certain "collect but protect" remedies to provide for collection of SNF costs and rates, but to fully protect them pending a resolution of the SNF disposal situation. In this regard, the Commission could consider the establishment of a "ratepayer

escrow" that would collect the SNF costs in rates but direct them to a separate external interest-bearing SNF site decommissioning trust fund of the same nature as the decommissioning trust established for utility plant decommissioning. The Commission could also inquire into the availability of insurance

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to protect ratepayers concerning SNF site clean-up costs, or the establishment of a separate external trust fund self-funded by DECo through amortization adjustments in rates. A downward rate adjustment could be adopted to provide for the funding of a self-funded insurance fund, or a form of self-funded corporate performance bond, to ensure the availability of funds for eventual site cleanup and SNF disposal. Similarly, the Commission could maintain the existing rate level insofar as it covers SNF fee, storage and other costs, on the condition that DECo file a bond committing itself to refunding said costs in the event that SNF disposal is not undertaken. The Commission should also by order bind the utility to reimbursing ratepayers for any damages it recovers in the federal Court of Claims. The utility in fact may be willing to agree to some of these "collect but protect" remedies as an alternative to an outright disallowance of their claimed costs.

The funds accumulated under the above "collect but protect" remedies would be available to either provide funds to address SNF disposal issues in the event the federal government permanently defaults

in its disposal duties, and to better protect ratepayers or the public left with the risk of paying for all costs of disposal at some future date. A more specific description of some of the "collect but protect" remedies that the Commission may adopt are described in my attached Exhibit I-80 (RCC-3).

The risk that the ratepayers or the public may be faced with these costs and risks is enhanced by the ongoing restructuring of the electric industry which has resulted in the sale or transfer of numerous nuclear plants, and the establishment of highly leveraged multi-layered limited liability corporations which have purchased nuclear plants. While nuclear plants are an asset when generating electricity, as the plants are retired the sizable SNF on site stockpiles will become a liability having negative economic value. At the

[p.22]

same time, a corporation holding title to SNF waste sites may be a virtual shell of little or no economic worth and which could be bankrupted to avoid liability. This establishes the need for some advance planning and resource allocation to address the risk of the federal default.

Q. How would you recommend the Commission approach these options?

A. I recommend that the Commission seriously consider all these options. However, if the Commission cannot adopt one or more of the options, I would then recommend for those options

that the Commission nevertheless articulate any outstanding issues or concerns, and provide a mechanism for their further and on-going review. I recommend that the Commission, wherever it may defer a ruling, not reject any option at this time. The Commission might also wish to consider additional avenues for evaluating or promoting options. This approach is recommended because these issues will have great importance for decades to come, and all options for action should be thoroughly and periodically considered. In other words, an effective option should not be summarily dismissed on an inadequately considered basis.

Q. What gains do you see coming from Commission action?

A. There would be several. First, the state, ratepayers, taxpayers and the public interest would be better protected against the continuing cost impacts and financial risks associated with federal disposal program failures and delays. Secondly, Commission action would provide each utility a meaningful signal to increase its diligence and aggressiveness in protecting and enforcing its rights with the federal government, and in protecting the ratepayers and Michigan's interest by pursuing an effective federal program. Third, the Commission could continue its long-standing national advocacy for

[p.23]

success in the nuclear waste disposal program, and make a nationally recognized contribution to assuring the safe and secure disposal of SNF

Q. Does this complete your testimony?

A. Yes.

MICHIGAN PUBLIC SERVICE COMMISSION
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MPSC Case No. U-13808
RCC-1
Exhibit_____

RONALD C. CALLEN

2455 Woodlake Circle
Okemos, MI 48864-5941

Telephone: 517-381-9193
Facsimile: 517-381-0268
E-Mail: callenrc@yahoo.com

Current Activity

Consultant and Expert Witness on nuclear waste disposal, under contract with Clark Hill P.L.C., under a grant from the Michigan Utility Participation Board.

Assistant Director of Electric Division
Michigan Public Service Commission
Lansing, MI (Retired)
1986-1990, 1992-1998

Served Michigan Attorney General as legal team technical expert; team represented 35 states in two cases before U.S. Court of Appeals and appeal to U.S. Supreme Court to redress federal inaction on nuclear waste disposal and misuse of ratepayer funds.

Chief advisor and federal representative for Michigan Public Service Commission (MPSC) on nuclear waste

disposal. Maintained advocacy as ratepayer representative in four-year effort to encourage and direct Congressional passage of corrective legislation. Investigated national spent nuclear fuel discharge, inventory, transportation and federal storage capability in pursuit of national federal policy. Tracked ratepayer funding of federal program and served as national advocate for redirection of funds for legally mandated purposes. Founding member, state representative and Congressional contact in 22-state Nuclear Waste Strategy Coalition. Principal investigator of problems with management of nuclear waste disposal by U.S. Department of Energy; co-author of definitive recommendation for redress. Investigator and advocate for adequate decommissioning fund reserve for nuclear power plants including impact of delay in nuclear waste disposal.

Upon retirement, 1998, received commendations from Governor, Attorney General, Michigan Public Service Commission, National Association of Regulatory Utility Commissioners (NARUC) and Nuclear Waste Strategy Coalition.

Managed staff activities on nuclear licensing procedures and federal review including waste disposal and decommissioning; entered contested casework on behalf of Michigan ratepayers. Developed and enhanced state-federal regulatory interaction and advanced NARUC-NRC program of issues pursuit. Investigated nuclear plant operation and licensing, financially impactive events, changes and anomalies;; consulted with Commission and placed issues into regulatory procedures seeking resolution by

Commission. Instituted interaction between Commission and U.S. Nuclear Regulatory Commission (NRC) leading to plant assessments and sharing activity on licensee performance. Acted as State expert with U.S. Nuclear Regulatory Commission on interactive issues of regulation.

Led NARUC review of the national nuclear waste disposal program, organized its critical review, assisted in establishment of the NARUC Nuclear Waste Disposal Subcommittee, organized the Staff Subcommittee acting as its Chairman for five years, and as expert advisor to NARUC Subcommittee on Nuclear Waste Disposal and Committee on Electricity. Organized NARUC reviews, Congressional appearances and those with U.S. Department of Energy (DOE) and NRC and acted as liaison with NRC Staff on nuclear waste disposal and nuclear power plant economic and nuclear safety regulation. Created and issued for ten years analysis of state-by-state payments to Nuclear Waste Fund, developed Congressional testimony, prepared and delivered reports in federal progress and problems at all Subcommittee meetings.

Participant, Wye River Dialogue on Nuclear Waste, Aspen Institute and Advisory Board on formation of the Dialogue.

Developed procedures, rationale and legislation to require state approval of power plant siting. Developed procedures for integrated resource planning (IRP), assessed processes of other states and brought recommendations to Commission for approval. Helped institute first Michigan IRP procedures and led the

environmental review portion and contributed to overall review and decisions on Staff response.

Acted as Commission expert on air pollution control including interaction with Michigan Air Pollution Control Commission and staff. Directed and developed MPSC position on federal legislation and conveyed it to the U.S. Congress. Advocated for a state-wide global warming economic impact study with U.S. Environmental Protection Agency (EPA); led establishment of its data-gathering, initial goals and state-wide review process by state government, major utilities and U.S. automobile manufacturers.

Led development of formal procedures for state-wide gas and oil pipeline environmental review, published those results, managed over 200 cases, acted as expert witness in contested cases before the Commission, represented Commission and Department with state environmental review board and led its Inter-Governmental Environmental Review Board.

Director Nuclear Waste Program Assessment
Office National Association of Regulatory
Utility Commissioners
Washington, D.C.
1990-1992

Conceived, established and directed NARUC's first single purpose office to interact with the U.S. Department of Energy, the Congress of the United States, the federal program review agencies and the utility and nuclear industry on progress of the national nuclear waste disposal program. Represented the Subcommittee and NARUC on boards and review

groups, assessed Congressional impact opportunities, acted as expert investigator of state and federal actions that use ratepayer funds for federal nuclear waste disposal. Monitored contact with all significant agencies and most state commissions. Brought to the NARUC Subcommittee and the Committee on Electricity options and recommendations for pursuit of redress and improvement of national program. Acted as agent, assessor and developer of federal policy recommendations for pursuit with the U.S. Congress through appearance and legislative initiative.

Performed all administrative functions including office setup, operation and handling of funds. Wrote periodic newsletter and produced a periodic record of state-by-state payments to the federal expenditures from the Nuclear Waste Fund. Appeared on behalf of the NARUC at workshops, waste program review boards of the Department of Energy and formally, before the Nuclear Waste Technical Review Board on behalf of the NARUC. Represented NARUC at staff meetings with DOE, NRC, U.S. Technical Review Board, U.S. Office of Technology Assessment and U.S. General Accounting Office. Acted as expert at workshops and as invited speaker at industry and utility conferences.

Director, Scientific Research and Development
Director, Scientific & Environmental Studies
Operational Development Division
Michigan Public Service Commission
Lansing, Michigan
1973-1986

Organized and directed unit to resolve major issues for Commission involving scientific and technical

investigations and inter-agency coordination. Issues included nuclear power use, regulation and waste disposal, public acceptance, decommissioning and electric power plant certification. Special focus on federal nuclear power plant operations high level nuclear waste program and state response, and energy-economic balancing of final decisions. Managed electric utility air and water pollution control requirements, cost, and energy impact analysis, and natural gas and oil pipeline certification.

Project Director
Enrico Fermi I Fast Breeder Reactor
Atomic Power Development Associates
Detroit, Michigan
1965-1973

Program and Licensing Director for oxide core power demonstration project; senior scientific investigator of fuel-melting incident; and developer of means to prevent and detect any recurrence; reactor power test physicist; license coordinator for early phase of plant decommissioning.

Senior Physicist
Connecticut Advanced Nuclear Engine Laboratory
Pratt & Whitney Aircraft Company
Middletown, Connecticut
1957-1963

Experiments Director and Analytical Physicist for space nuclear power reactor experimental physics studies; licensed nuclear critical experiments operator, director of power and flux radioactivation physics tests.

Activities and Memberships

State of Michigan Representative and original member of the Nuclear Waste Strategy Coalition; NARUC Nuclear Waste Subcommittee Staff; liaison to Michigan Department of Natural Resources on Environmental Risk; Group Leader for MITRE Workshop on Nuclear Power, NARUC Representative to DOE Workshops on Strategic Issues, Mission Plan Revision and Contingency Planning; Group Leader, workshop on nuclear waste disposal, U.S. Nuclear Regulatory Commission. Liaison with all state commissions on nuclear waste disposal, informal advisor to Chair, Minnesota Department of Public Service.

Author: *Congress' Nuclear Waste Contract with America - Where Do We Go From Here?* The Electricity Journal, June 1995.

Co-author: *Redesigning the U.S. High Level Nuclear Waste Disposal Program for Effective Management,* Nuclear Waste Strategy Coalition, August, 1994.

Papers: Co-author, 1992 International Conference on Nuclear Waste Disposal; frequent testimony for the U.S. Congress; U.S. Nuclear Regulatory Commission Introductory Conference on Nuclear Waste Disposal: Introductory Speaker for the Michigan Public Service Commission forum on Nuclear Waste Disposal: author, *Summary of the Forum,* 1993.

Lecturer, NARUC Regulatory Studies Institute.

Appearances: U.S. DOE; U.S. Nuclear Waste Technical Review Board; Independent Panel for Review of DOE Nuclear Waste Program Management; Office of the U.S. Nuclear Waste Negotiator, Radioactive Waste Review Board, National Academy of Sciences; Western Interstate Energy Board; National Conference on Nuclear Waste Transportation and the Public Role; American Nuclear Society Conference on Decommissioning and Disposal; National Conference of State Legislatures; Vermont Governor's Nuclear Advisory Board; NRC State Liaison Program; Workshop to Review the DOE Program by Affected Units of Nevada Government; and Decision Maker's Summit on Radioactive Waste Disposal, the Radioactive Exchange.

Co-founder, Michigan Representative, Member of Executive Committee, State Working Group on High Level Nuclear Waste, National Governors Association.

Member, Governor's Advisory Committee on High Level Nuclear Waste Disposal and Governor's Task Forces on High Level and Low Level Nuclear Waste.

Liaison for MPSC to the Michigan Air Pollution Control Commission and Department of Commerce; Representative to the Michigan Environmental Review Board.

Task Force Chairman, Governor's Special Commission on Energy.

Chairman, Michigan Intergovernmental Environmental Review Committee.

Member, Michigan Utilities Reform Task Force.

Consultant, on-loan on state utility regulation, U.S. Nuclear Regulatory Commission, 1978.

Board Member, Nuclear Emergency Planning Hearing, Michigan Public Service Commission, 1975.

Adjunct Associate Professor, Michigan State University, 1980.

Workshop Leader, Advisory Conference for State Officials on Nuclear Waste, U.S. Nuclear Regulatory Commission. Advisory Commission, Citizens for Science Program, National Science Foundation; Energy Technology Committee, Michigan Energy Resources and Research Association. Originator, Michigan Acid Rain Forum; Member, Michigan Coastal Zone Energy Impact Advisory Committee; Member, American Association for Advancement of Science; Michigan Association of Environmental Professions.

Education

Graduate, Regulatory Studies Program, Michigan State University, 1979.

Courses in personnel management, interpersonal relations, computer programming.

M.A. Physics. Thesis - Inelastic Neutron Scattering in P-31, Wesleyan University, Middletown, Connecticut.

B.A. cum laude, major in mathematics, Wabash College, Crawfordsville, Indiana.

Personal

Commissioner and Chairman, Lansing Municipal Board of Water and Light; Chairperson, Lansing West Side Air Quality Committee; Chairman, City of Lansing Tree Preservation Committee; Mayor's Committee on Energy Conservation; Lansing Mayor's Transition Committee; Chairman, Education Committee, Lansing Coalition for Community Concerns; Board of Directors, World War II Veterans Memorial Hospital, Meriden, Connecticut; Board of Trustees, Emmanuel Lutheran Church, Meriden, Connecticut and Grace Lutheran Church, Lansing, Michigan; Mid-Michigan Unity Coalition.

Special interest in public science interface on issues of energy, nuclear waste and environment; quality and equal education, racial relations and minority opportunities.

Married, three adult children

MICHIGAN PUBLIC SERVICE COMMISSION
FILE U - 13808
EXHIBIT NO. I- 79
DATE 04/13/04 Merrill Reporter

NUCLEAR WASTE FUND RATEPAYER PAYMENTS BY STATE

[Fold-out exhibit, see next three pages]

MPSC Case No. U-13808
RCC-2
Exhibit _____

NUCLEAR WASTE FUND
RATEPAYER PAYMENTS BY STATE
THROUGH 3-31-03 (MILLIONS OF DOLLARS)

STATE	PAYMENTS (1 mill/kwh, One Time+int)	RETURN ON INVESTMENTS	TOTAL (PAY+RETURN)	DEBT*	FUND ASSETS** (TOTAL + DEBT)
AL	409.2	233.2	642.4	0	642.4
AR	229.2	130.6	359.8	148	507.8
AZ	175.1	99.8	274.9	0	274.9
CA	727.7	414.7	1142.4	0	1142.4
CO	0.2	0.1	0.3	0	0.3
CT	208.6	118.9	327.5	303.1	630.6
DE	32.0	18.2	50.2	0	50.2
FL	632.7	360.6	993.3	0	993.3
GA	454.4	259.0	713.4	0	713.4
IA	179.1	102.1	281.2	38.3	319.5
IL	1211.3	690.3	1901.6	822.4	2724.0
IN	161.5	92.0	253.5	194.8	448.3
KS	90.9	51.8	142.7	0	142.7
KY	103.5	59.0	162.5	0	162.5
LA	209.0	119.1	328.1	0	328.1
MA	248.8	141.8	390.6	138.1	528.7
MD	283.7	161.7	445.4	0	445.4
ME	45.5	25.9	71.4	99	170.4
MI	197.0	112.3	309.3	167.8	477.1
MN	246.2	140.3	386.5	0	386.5
MO	173.8	99.0	272.8	5.1	277.9
MS	118.6	67.6	186.2	0	186.2
NC	1083.6	617.5	1701.1	0	1701.1
ND	13.0	7.4	20.4	0	20.4
NE	143.7	81.9	225.6	0	225.6
NH	51.3	29.2	80.5	20.3	100.8
NJ	493.1	281.0	774.1	166.7	940.8
NM	51.0	29.1	80.1	0	80.1
NY	549.6	313.2	862.8	428.3	1291.1
OH	309.5	176.4	485.9	27.7	513.6
OR	75.1	42.8	117.9	0	117.9
PA	912.2	519.9	1432.1	56.3	1488.4
RI	3.9	2.2	6.1	5.2	11.3
SC	485.0	276.4	761.4	0	761.4
SD	3.6	2.1	5.7	0	5.7
TN	337.8	192.5	530.3	0	530.3
TX	470.0	267.8	737.8	0	737.8
VA	513.3	292.5	805.8	0	805.8
VT	72.5	41.3	113.8	119.9	233.7
WA	110.7	63.1	173.8	0	173.8
WI	329.6	187.8	517.4	0	517.4
SUBTOTAL	12146.5	6922.1	19068.6	2741	21809.6
FEDERAL	19.8	11.3	31.1	0	31.1
INDUSTRY	16.8	9.6	26.4	0	26.4
TOTAL	12183.1	5943	19126.1	2741	21867.1

* Funds owed for fuel burned before 1983 but not yet paid by utilities (as allowed by DOE contract)

** before withdrawals for expenditures by DOE

Prepared by Ron Howe, Michigan Public Service Commission staff

rhowe@michigan.gov 517 241-6021

MICHIGAN PUBLIC SERVICE COMMISSION
FILE U-13808
EXHIBIT NO. T-79

Consolidated Accounting and Investment System
Nuclear Waste Fund
Quarterly Statement of Payments
(NE44178) Detroit Edison Company
Fiscal Quarter: 07/01/2003 thru 09/30/2003

	Enrico Fermi 2 (1402)	Contract Total
Net KWH Payments thru Prior Quarter:	93,831,713.00	93,831,713.00
KWH Payments to DOE this Quarter:		
KWH Fees	1,215,348.00	1,215,348.00
Adjustments	0.00	0.00
Less KWH Fee Credits/Refunds this Quarter:		
KWH Fee Credits	0.00	0.00
KWH Fee Refunds	0.00	0.00
Adjustments	0.00	0.00
Net KWH Payments to Date	94,237,061.00	94,237,061.00
KWH Interest Credits/Refunds thru Prior Quarter:	368,241.13	368,241.13
KWH Interest Credits/Refunds this Quarter:		
KWH Interest Credits	0.00	0.00
KWH Interest Refunds	0.00	0.00
Adjustments	0.00	0.00
KWH Interest Credits/Refunds to Date	368,241.13	368,241.13
KWH Penalties Assessed thru Prior Quarter:	0.00	0.00
KWH Penalties Assessed this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total KWH Penalties Assessed	0.00	0.00
KWH Penalties Paid thru Prior Quarter:	0.00	0.00
KWH Penalties Paid this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total KWH Penalties Paid to Date	0.00	0.00
BALANCE of KWH Penalties DUE	0.00	0.00

MPSC Case No. U-13808
RCC-2
Exhibit _____

Consolidated Accounting and Investment System
Nuclear Waste Fund
Quarterly Statement of Payments
(NN44378) Detroit Edison Company (continued)
Fiscal Quarter: 07/01/2003 thru 09/30/2003

	Enrico Fermi 2 (1402)	Contract Total
SNF Penalties Assessed thru Prior Quarter:	0.00	0.00
SNF Penalties Assessed this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total SNF Penalties Assessed	0.00	0.00
SNF Penalties Paid thru Prior Quarter:	0.00	0.00
SNF Penalties Paid this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total SNF Penalties Paid to Date	0.00	0.00
BALANCE of SNF Penalties DUE	0.00	0.00
SNF Principal Due thru Prior Quarter:	0.00	0.00
SNF Principal Due this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total SNF Principal Due	0.00	0.00
SNF Interest Accrued thru Prior Quarter:	0.00	0.00
SNF Interest Accrued this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total SNF Interest Accrued	0.00	0.00
Total SNF Principal & Interest Due	0.00	0.00
SNF Principal Paid thru Prior Quarter:	0.00	0.00
SNF Principal Paid this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total SNF Principal Paid to Date	0.00	0.00
SNF Interest Paid thru Prior Quarter:	0.00	0.00
SNF Interest Paid this Quarter	0.00	0.00
Adjustments this Quarter	0.00	0.00
Total SNF Interest Paid to Date	0.00	0.00
Total SNF Principal & Interest Paid to Date	0.00	0.00
BALANCE of SNF Principal & Interest Due	0.00	0.00

MPSC Case No. U-13808
RCC-2
Exhibit _____

MPSC Case No. U-13808
RCC-3
Exhibit I-80

SNF FEES

COLLECT BUT PROTECT REMEDIES

The Commission should consider and adopt various measures to protect ratepayers, the state's taxpayers, and the long-range public interests of the state in the event of an outright failure of the federal program and of utilities to store and dispose of the SNF. Possible options for action include the following:

- Rate and PSCR case investigations and adjustments, and generic reporting requirements: The Commission, in rate and PSCR cases, and in this case, should institute filing requirements to ensure that each nuclear utility serving Michigan ratepayers fully detail in their rate and PSCR applications, and testimony and exhibits, all costs incurred to store or dispose SNF, and to pay for the federal fee, and the resulting rate recoveries being requested. The Commission should ensure a full and on-going investigation of these issues in each rate and PSCR case, and should consider and adopt appropriate rate remedies and conditions to fully protect ratepayers and the public interest. This function can start immediately with this case, through the adoption of an order that facilitates this result.

MPSC orders could also require utilities to commence reporting to the MPSC on a formal basis, no less than annually, on all efforts the utilities have undertaken to reasonably administer and enforce their contracts with the DOE. The report should require full disclosure by utilities of their efforts undertaken in the courts, before Congress, and through private initiatives, to not only enforce their contract, but to seek reimbursement of costs or damages, and to also develop alternatives for SNF storage and disposal in the event the federal government totally fails in its responsibilities.

The utilities could also report all estimated costs that may be incurred to undertake various alternative actions and could recommend their own proposals for action. The reports should include contingency plans in the event that the federal government fails to carry out its obligations for the storage and disposal of SNF. The MPSC could also require reporting of escrow funds, and performance bond contributions placed into escrow, and earnings thereon, pursuant to the related proposals discussed below. The report should include an evaluation of the DOE program, its likelihood for success, and a report on efforts by utilities to improve DOE'S management and cost-effectiveness.

- SNF Site Decommission Trust for Escrow of Fee Collections from Ratepayers: The Commission should consider ordering the establishment of an external escrow fund in the nature of an

SNF site decommissioning trust. This fund would be analogous to the current requirements of the decommissioning fund for each nuclear plant, to receive the funds collected in rates equivalent to the present 1 mil/kWh fee which utilities pay to the federal government under their Standard Contract, and also for the pre-1983 fuel burned at nuclear plants. In the event of federal failure, the escrowed funds would provide financial resources for a replacement disposal initiative.

Commission action would be fully consistent with the purposes of the NWPA, and the Standard Contract which is subservient thereto (See Section 111(b) of the NWPA, 42 USC 10131(b)). The stated purposes of the Act includes providing "a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel. . . "and ensuring that payments to the Nuclear Waste Fund are ". . . composed of payments made by the generators and owners of such waste and spent fuel. . ." and "will be borne by the persons responsible for generating such waste and spent fuel." All of the purposes and provisions of the NWPA are fully adhered to if the MPSC authorizes the collection of an equivalent amount of the fees in rates, but then requires for the protection of ratepayers and the state of Michigan, the escrowing of these funds in an external SNF site decommissioning trust. Each utility itself will still be free to pay, or not

pay, the fee to the federal government pursuant to its Standard Contract.

The terms of the escrow or SNF site decommissioning trust could be identical to or very similar to the terms for the present external trusts governing plant decommissioning funds regulated by the Commission. For example, the funds in the escrow could be released to each utility or its successor owner of nuclear plants, at such time that the SNF is removed to a centralized interim storage facility or a repository. The escrow also would earn interest and be subject to the same requirements and protections as external decommissioning funds.

A variant of this option is for the Commission to commence in this case a partial escrow of the funds, subject to each utility providing a plan or report concerning its enforcement actions taken or planned. The Commission could later increase the escrow amounts depending upon the adequacy of each utility's efforts. For example, in this case, the Commission could order escrow of some factor of the 1 mil/kWh charge includable in rates. Each utility could be required to further demonstrate in future PSCR and other cases that they are actively enforcing their contract with DOE.

The commission has also essentially adopted this approach in at least one instance relative to escrowing collections from ratepayers of the 1 mil/kWh fee for SNF disposal. In its November

26, 1996 order, Case U-11237, the MPSC approved I&M/AEP's application to reclassify Michigan jurisdictional pre-April 7, 1983 SNF funds (collected from ratepayers) as decommissioning funds. This made some of I&M/AEP's federal SNF fee collections subject to the terms and conditions of their decommissioning trust. The Commission in this and other cases should now expand this protection by requiring all nuclear utilities to similarly escrow in separate external trusts all funds collected from ratepayers, both past and future, for the 1 mil/kWh SNF fee.

- Performance Bond. In addition to and separate from the escrow of the funds collected from ratepayers, the Commission could also order each utility to file a performance bond to require successful performance by each utility to properly transfer SNF to a centralized interim storage facility or repository. The performance bond can be in the form either of a bond secured from an insurance company or other entity, or can be funded by each utility on an incremental basis from stockholder funds.[1] The performance bond, if secured by stockholder contributions, would be placed in an escrow separate from the ratepayer funds escrow. However, the contributions by stockholders to this

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[1] To emphasize, the funding of a performance bond fund by stockholders would be completely separate and in addition to the escrow of the rates collected commensurate with the 1 mil/kWh fee paid by each utility to the federal government under their Standard Contracts.

performance bond fund would not be includable in each utility's expenses or costs of service for ratemaking purposes. This performance bond fund would be required of each utility as a private corporation engaged in the business of generating and selling nuclear power. The bond fund would revert to the stockholders of each utility, or the successor owners of each nuclear plant, at such time that the SNF is successfully exported or disposed.

The Commission could order stockholder contributions to the performance bond fund on an incremental basis through successive orders depending upon the size of the fund needed to fully protect ratepayers, taxpayers and the state and public interest. The Commission could also commence implementing the stockholder contributions to the performance bond escrow fund by subtracting a per-kWh factor from each utility's rate recovery in PSCR or other rate cases (such as a 0.25 to 1.0 mil/kWh factor) and by directing the subtracted funds into the separate performance bond fund commencing on a prospective basis with the Commission's orders in this case. The terms of the performance bond could be adopted from bonds which are required under other situations e.g., where private companies are engaged in hazardous waste management.

- Security or Liability Insurance: The Commission could consider other and additional forms of financial assurance, for example liability insurance, to protect the state's

taxpayers, ratepayers, public interests, including the long term economy and environment.

- Additional Protections for Residual Decommissioning Funds to Ensure Proper Storage and Disposal of SNF: The Commission could act to ensure that present decommissioning collections and funds, including both internal or external decommissioning funds, are fully protected, and that no decommissioning funds ever "default" to stockholders, and are guaranteed for return to ratepayers after SNF located at the nuclear sites are properly stored and disposed.

APPENDIX Q

NUCLEAR WASTE FUND PAYMENT INFORMATION BY STATE THROUGH Q3 FY 2007 (MILLION DOLLARS)

[Fold-out exhibit, see next page]

Nuclear Waste Fund Payment Information by State through Q3 FY 2007 (Million Dollars)

NEI
NUCLEAR ENERGY INSTITUTE

State	Total NWF Contributions	One-Time Fee Outstanding	Allocation of Interest on NWF	Total Liabilities
Alabama	684.1	0.0	515.1	1,199.2
Arizona	483.4	0.0	364.0	847.4
Arkansas	271.6	173.0	204.5	649.1
California	764.2	0.0	575.3	1,339.5
Colorado	0.2	0.0	0.2	0.4
Connecticut	337.1	459.4	253.8	1,050.4
Florida	716.7	0.0	539.6	1,256.3
Georgia	630.9	0.0	475.0	1,105.8
Illinois	1,617.2	974.0	1,217.5	3,808.7
Iowa	103.7	0.0	78.1	181.8
Kansas	172.0	0.0	129.5	301.6
Louisiana	294.8	0.0	221.9	516.7
Maine	65.5	177.4	49.3	292.2
Maryland	329.5	0.0	248.0	577.5
Massachusetts	151.7	0.0	114.2	265.9
Michigan	473.7	409.3	356.7	1,239.7
Minnesota	363.3	0.0	273.5	636.9
Mississippi	185.0	0.0	139.3	324.3
Missouri	178.3	0.0	134.3	312.6
Nebraska	242.2	0.0	182.4	424.6
New Hampshire	136.3	0.0	102.6	238.8
New Jersey	544.5	166.9	410.0	1,121.4
New York	721.5	483.6	543.2	1,748.2
North Carolina	763.8	0.0	575.1	1,338.9
Ohio	273.3	31.2	205.8	510.3
Oregon	75.5	0.0	56.9	132.4
Pennsylvania	1,428.4	85.0	1,075.4	2,588.8
South Carolina	1,147.6	0.0	864.0	2,011.6
Tennessee	413.4	0.0	311.3	724.7
Texas	540.2	0.0	406.7	947.0
Vermont	85.3	138.3	64.2	287.9
Virginia	645.8	0.0	486.2	1,132.1
Washington	144.9	0.0	109.1	254.0
Wisconsin	331.8	0.0	249.8	581.6
Other	7.6	0.0	5.7	13.2
Total	15,325.0	3,098.3	11,538.1	29,961.4

Source: Department of Energy

No. 08-573

Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,

Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND THE DETROIT EDISON COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

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COUNTER-STATEMENT OF QUESTION PRESENTED

Michigan law requires that electric utilities, such as Respondent The Detroit Edison Company (Edison), file annual Power Supply Cost Recovery (PSCR) cases before the Michigan Public Service Commission (MPSC or Commission). Michigan law also allows an electric utility's PSCR case to be combined with its retail electric rate case, which is what happened below. In a PSCR case, the MPSC approves the utility's recovery from utility customers of the utility's reasonable and prudent costs for purchasing and generating electricity. One of Edison's costs was its payment of spent nuclear fuel (SNF) fees to the Department of Energy (DOE) for the disposal of SNF from its nuclear plant.

Against this backdrop, the question presented is:

Whether the MPSC's opinion and order allowing Edison to recover its SNF fee costs under Michigan's PSCR law, and the Michigan Court of Appeals' opinion affirming the MPSC's opinion based on state-law grounds recently recited by that Court in *In re Application of Indiana Michigan Power Co.*, 275 Mich. App. 369; 738 N.W.2d 289 (2007), without reaching Petitioner's federal preemption argument,

COUNTER-STATEMENT OF QUESTION PRESENTED – Continued

presents a question of federal preemption such that this Court should grant the petition for a writ of certiorari.[1]

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[1] On November 3, 2008, this Court denied Petitioner's petition for writ of certiorari in Supreme Court Docket No. 08-246, where Petitioner presented the exact same preemption question regarding *In re Application of Indiana Michigan Power Co., supra*, that Petitioner presents here (compare page ii of the Petitions in Docket Nos. 08-246 and 08-573).

RULE 29.6 DISCLOSURE STATEMENT

The Detroit Edison Company is wholly-owned by DTE Energy Company. DTE Energy Company's stock is publicly-traded.

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INTRODUCTION

The Petition presents no sound basis for this Court to exercise jurisdiction. The Michigan Public Service Commission (MPSC or Commission) has repeatedly heard Petitioner's arguments about various electric utilities, including Respondent The Detroit Edison Company (Edison), paying spent nuclear fuel (SNF) fees to the Department of Energy (DOE). Based on the record in this state-law utility cost-recovery case, the MPSC found "that Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs and [Petitioner] has not successfully demonstrated otherwise." (24a).

The Michigan Court of Appeals has also repeatedly heard Petitioner's arguments challenging MPSC decisions finding that Petitioner failed to prove that electric utilities unreasonably or imprudently paid SNF fees to the DOE. In this case, the Court simply followed the Michigan Court Rules and its own recent state-law decision in *In re Application of Indiana Michigan Power Co.*, 275 Mich. App. 369; 738 N.W.2d 289 (2007), where the Court expressly declined to reach Petitioner's preemption arguments because the MPSC did not rely on federal preemption (192a, n. 5). On November 3, 2008, this Court denied Petitioner's petition for writ of certiorari regarding *In re Indiana Michigan Power Co.*, where Petitioner presented the exact same purported federal preemption question that Petitioner presents here (*see* page ii of the Petitions here and in Docket No. 08-246). Thus, this case

does not present any viable federal preemption question – let alone an important one that would merit this Court's review.

Petitioner mischaracterizes the MPSC and Michigan Court of Appeals' decisions in an effort to self-create a federal preemption question, irrespective of what the MPSC and Michigan Court of Appeals actually decided. Petitioner essentially, and erroneously, contends that: (1) the MPSC and Michigan Court of Appeals' decisions contradict decisions of this Court and other federal courts by erroneously holding that the SNF fee is mandated by 42 U.S.C. §10222, and disregarding the reciprocal obligation between payment of the fee in exchange for the DOE commencing disposal of SNF by January 31, 1998; (2) because the DOE has breached its SNF disposal obligation, utilities are no longer obligated to pay the SNF fee, so the MPSC should have found that Edison unreasonably and imprudently continued to pay the fee; (3) the MPSC and Court of Appeals found that federal law preempted the disallowance of cost recovery and other "remedies" Petitioner sought; and (4) these supposed errors regarding federal preemption have significant national importance and have improperly constrained the MPSC's ratemaking authority.

An accurate review of this case demonstrates that there is no question of federal preemption that is appropriately presented for review by this Court. The MPSC and Michigan Court of Appeals properly decided this case based on the evidentiary record and

state law. The MPSC did indicate that it agreed with a lengthy discussion by the Administrative Law Judge (ALJ) who presided over this case, which discussion included one sentence referring to preemption, but there is no merit in Petitioner's attempt to read those statements out of context (24a, 39a-44a). Those statements are part of the ALJ's recommendation to the MPSC, and the MPSC's decision finding that Edison reasonably and prudently paid the SNF fee, and therefore could recover those costs under Michigan law, in light of the risks and consequences that Edison would face (such as the loss of its license to operate its nuclear plant) if it were to stop paying the SNF fee based on Petitioner's legal theory that Edison does not really have to pay the fee.

The Court of Appeals appropriately affirmed the MPSC because a published decision of the Court of Appeals is binding precedent under the Michigan Court Rules. The Court had just rejected all of Petitioner's SNF arguments in *In re Application of Indiana Michigan Power Co., supra,* where the Court recognized that the MPSC did not decide a question of federal preemption, and similarly declined to decide it (192a, n. 5: "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. We need not consider this argument because the PSC did not rely on the doctrine of federal preemption").

Petitioner's claim that this case has national significance is misguided, particularly since Petitioner attempts to support its claim with misstatements

regarding the record and the decisions below. The Petition arises from a Michigan PSCR plan case, where the key issue is whether the utility's PSCR plan is reasonable and prudent. Based on a full and complete evidentiary record, the MPSC determined that "Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and [Petitioner] has not successfully demonstrated otherwise." (24a). Petitioner merely wishes to substitute its judgment concerning what is "reasonable and prudent" for that of the MPSC – essentially that Edison should stop paying the SNF fee based on Petitioner's legal theory, instead of paying the fee and thereby avoiding the risks of severe consequences, as demonstrated on the record.

The MPSC properly decided this case, and the Michigan Court of Appeals properly affirmed the MPSC's decision based on Michigan law. There is no significant public interest issue at stake here, and any claimed confusion and uncertainty in the decisions below arise from Petitioner's own misstatements.

None of the criteria warranting this Court's review are present, so the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

I. BACKGROUND AND SUMMARY OF THE DECISIONS BELOW.

The Detroit Edison Company (Edison) is an electric utility that owns and operates the Fermi 2 nuclear generating plant, which supplies electricity to Michigan customers. Edison pays Nuclear Waste Fund fees for Spent Nuclear Fuel (SNF) to the Department of Energy (DOE) pursuant to 42 U.S.C. §10222(a)(2). (64a). The federal SNF disposal program did not begin as scheduled (January 31, 1998), but the DOE maintains that it will begin eventually.

Michigan law authorizes the Michigan Public Service Commission (MPSC or Commission) to include a Power Supply Cost Recovery (PSCR) clause in an electric utility's rate schedule. 1982 P.A. 304 ("Act 304"). A PSCR clause allows a utility to charge its retail customers for the anticipated costs associated with generating and purchasing electricity, and requires electric utilities such as Edison file annual plans for approval by the MPSC.[2] SNF fees are costs

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[2] Act 304 relevantly provides:

"(1) As used in this act:

"(a) 'Power supply cost recovery clause' means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the

(Continued on following page)

that result from the disposal of nuclear fuel rods that have been used to generate electricity. Thus, for purposes of ratemaking in Michigan, Edison's SNF fee is classified as a nuclear fuel expense, and is included as a power supply cost reflected in Edison's PSCR plan. The Petition arises from the MPSC's approval of Edison's 2004 PSCR plan, which the Michigan Court of Appeals affirmed.

More specifically, the Petition arises from MPSC Case No. U-13808, which was a combined PSCR/general rate case for Edison.[3] The Michigan Environmental Council (Petitioner) (together with the Public Interest Research Group in Michigan (PIRGIM)) intervened

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booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

"(b) 'Power supply cost recovery factor' means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility." M.C.L. 460.6j(1)(a) and (b). (123a-124a).

[3] Petitioner also refers to a number of other cases, which are irrelevant because Petitioner does not seek review of those cases (other than *In re Application of Indiana Michigan Power Co.* in Docket No. 08-246, where this Court has denied review). Petitioner's description of those cases is also misleading because it is inaccurate and incomplete. Notwithstanding Supreme Court Rule 15.2, Edison declines to burden the Court with a lengthy recitation of corrections to Petitioner's countless (and ultimately irrelevant) misstatements about other decisions, which speak for themselves and reveal Petitioner's inaccuracies.

and challenged Edison's recovery of the SNF fee that Edison pays to the DOE. Petitioner further advocated the imposition of new financial and reporting requirements on Edison for the disposal of SNF (Tr 2484-2507).[4] Edison witness Colonnello responded with several reasons why Petitioner's proposals lacked merit (Tr 2629-41).

The Administrative Law Judge (ALJ) who presided over the proceedings recommended that the MPSC reject Petitioner's arguments, in accordance with the MPSC's previous decisions, which had been affirmed by the Michigan Court of Appeals. (39a-44a, citing *Michigan Environmental Council v. Public Service Comm., unpublished opinion per curiam of the Court of Appeals, decided December 9, 2003* (Docket Nos. 240403 and 240406), *lv. den.*, 471 Mich. 870 (2004) (Appendix T in Supreme Court Docket No. 08-246, 348a-357a, affirming the MPSC in MPSC Case Nos. U-12613 and U-12615).

The Commission agreed, and recognized that it had repeatedly rejected Petitioner's identical arguments in prior cases:

> "MEC/PIRGIM maintains that the ALJ erroneously endorsed the position taken by Detroit Edison regarding the issue of spent nuclear fuel (SNF) fees by finding that the

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[4] Unless otherwise indicated, "Tr [page number]" refers to the lengthy record in Case No. U-13808, which is available on the MPSC's website.

> matter should not be considered in this proceeding.
>
> "The Commission finds that the ALJ cannot be faulted for his recommendation. On several prior occasions, the Commission has addressed related issues. *See*, the November 20, 2001 order in Case No. U-12613. Moreover, the issues raised by MEC/PIRGIM are currently under consideration in a complaint proceeding docketed as Case No. U-13771." (32a).[5]

Petitioner moved for rehearing, which the Commission denied because Petitioner simply repeated its arguments, and the record demonstrated that Edison was reasonable and prudent in paying SNF fees to the DOE:

> "The Commission finds that the petition for rehearing should be denied, as the petition does not meet the standards for granting rehearing. MEC/PIRGIM merely raises again the same arguments that the Commission should involve itself in judging the reasonableness of costs assessed by federal statute. **The Commission finds that Detroit**

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[5] Case No. U-13771 concerned Petitioner's generic complaint against Michigan utilities regarding SNF issues. Petitioner refers to that case, indicating that the ALJ found that the MPSC has authority to adopt its proposed remedies (Petition, p. 30, n. 10). Petitioner neglects to mention that the MPSC later dismissed the complaint, without prejudice, due to Petitioner's failure to even state a *prima facie* case (Appendix X in Supreme Court Docket No. 08-246, at 590a-591a).

Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise.

> "As the Commission intended to convey in its November 23, 2004 order, it agrees with the discussion and conclusions of the Proposal for Decision at pages 110-113. The Commission is not persuaded that it should reach a different conclusion at this time." (24a, emphasis added).

Petitioner inaccurately asserts: "The MPSC below adopted the ruling of the Administrative Law Judge ("ALJ") in favor of federal preemption" (Petition, p. 3). In reality, as indicated above, the ALJ set forth a detailed recommendation focusing on state law and MPSC precedent as bases for rejecting Petitioner's requested relief (39a-44a), with only one sentence referring generally to preemption (40a, "Finally, the ALJ believes that preemption prevents state intervention into the federally regulated nuclear arena."). The ALJ noted this belief in the context of his lengthy discussion outlining the Petitioner's arguments, and the ALJ recommended that the Commission follow its prior decision in Case No. U-12613, finding that a utility's payment of SNF fees to the DOE is reasonable and prudent, notwithstanding Petitioner's assertion that utilities really do not have to pay those fees (40a-44a).

In agreeing with the ALJ's discussion, the MPSC explained that it found no merit in Petitioner's position that the MPSC should "involve itself in judging the reasonableness of costs assessed by federal statute" (24a). There is no federal preemption issue, since it is undisputed that a federal statute assesses the SNF fee.[6] Even Petitioner's own witness acknowledged that Edison's SNF costs for its nuclear plant included "the federally assessed fee for disposal, which is currently one mill per kilowatt hour" (257a), and that the fee "will continue to be assessed throughout the entire life of the plant." (258a).

Petitioner asserted before the MPSC (and maintains) the theory that Edison does not really have to pay the "federally assessed fee" that is provided by federal statute, and that Petitioner's own witness acknowledged. Edison responded by presenting qualified expert and factual testimony that if Edison did not pay the SNF fee to the DOE, then Edison would risk severe consequences including the loss of its license to operate its nuclear plant. Thus, based on the record, the MPSC found that Petitioner failed to carry its state-law burden of proving that Edison acted unreasonably or imprudently in paying the

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[6] 42 U.S.C. §10222(a)(2) states: "For electricity generated by a civilian nuclear reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) [for standard contracts between nuclear utilities and the DOE] shall be equal to 1.0 mill per kilowatt-hour." (64a).

SNF fee, and the MPSC allowed Edison to recover its costs in its PSCR plan (24a).

Petitioner's discussion of Edison's evidence and briefing is inaccurate and incomplete. It is also misleading because it ignores or mischaracterizes the context. Petitioner intervened in Edison's cost-recovery case, and injected the assertion that Edison could not recover SNF fee costs that it paid. Edison responded with evidence demonstrating that Edison was reasonable and prudent (the state-law standard for cost recovery under Act 304) in paying federal fees rather than risk consequences such as the loss of its license to operate its nuclear generating plant. One of the foundations for Petitioner's legal position was (and is) that the MPSC is not preempted by federal law (*see*, for example, 192a, n. 5). Edison was compelled to address the issues that Petitioner attempted to inject. Ultimately, however, neither the MPSC nor the Michigan Court of Appeals reached the federal preemption issue because state law grounds alone demonstrated (irrespective of federal law) that Edison acted reasonably and prudently, and there was no sound basis for the MPSC to disallow Edison's cost recovery or take Petitioner's other suggested "remedies" against Edison.

The Court of Appeals affirmed the Commission and rejected Petitioner's arguments, following its opinion (authored by the same Judge about 10 weeks earlier) in *In re Application of Indiana Michigan Power Co., supra,* where the Court expressly declined to address federal preemption because the MPSC did

not rely on it (192a, n. 5). Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court, pressing its erroneous claims concerning federal preemption in this case. The Michigan Supreme Court denied Petitioner's application (45a-51a).

Petitioner filed a petition for writ of certiorari in Supreme Court Docket No. 08-246, where Petitioner presented exactly the same preemption question regarding *In re Application of Indiana Michigan Power Co., supra*, that Petitioner presents here (*see* page ii of the Petitions). Petitioner asked the Court to consider that petition and this one on a consolidated basis (Docket No. 08-573 Petition, p. 3, n. 3). On November 3, 2008, this Court denied the petition in Docket No. 08-246.

REASONS FOR DENYING THE PETITION

I. THE MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN COURT OF APPEALS' DECISIONS ARE BASED ON MICHIGAN LAW AND THE EVIDENTIARY RECORD.

This case does not present an appropriate vehicle to examine the federal preemption question that Petitioner attempts to raise. This case was decided on the basis of Michigan law as applied to the evidentiary record before the MPSC, so there is no sound

basis for this Court to review this case. Supreme Court Rule 10.

The MPSC simply found the SNF fee costs incurred by Edison were reasonable and prudent based on the evidentiary record, applying the state-law reasonable and prudent standard for utility cost recovery under Michigan's Act 304. The Michigan Court of Appeals simply followed its prior published state-law decision in *In re Application of Indiana Michigan Power Co., supra*, which the Court was required to follow under the Michigan Court Rules, M.C.R. 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis") and M.C.R. 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.") (176a-177a).

In *In re Application of Indiana Michigan Power Co.*, the Court of Appeals explained that the MPSC had the discretion (under well-established Michigan law) to weigh the evidence presented on the record, and that Petitioner failed to establish that the utility was unreasonable or imprudent in paying SNF fees to the DOE:

> "IMPCo presented evidence that payment of the SNF fees was mandated by federal law and its standard contract with the DOE, and

> that failure to make the payments could lead to imposition of interest charges and possible loss of its license to operate its nuclear facility. **The PSC was entitled to rely on the evidence presented by IMPCo on this issue, rather than the evidence presented by appellants.** *Great Lakes Steel Div. of Nat'l Steel Corp. v. Pub. Service Comm.*, 130 Mich. App. 470, 481; 344 N.W.2d 321 (1983). **Moreover, the PSC concluded that, in the absence of evidence that IMPCo acted unreasonably and imprudently with regard to the collection of SNF costs, it had no authority to impose additional remedies such as those suggested by appellants. Appellants point to no statute or caselaw that holds to the contrary.**
>
> "The basis for the PSC's decision is set out clearly in its order approving IMPCo's PSCR plan, and in particular in its order denying appellants' petition for rehearing. Appellants' argument that the PSC's decision is unlawful and unreasonable because it does not comply with Const. 1963, art. 6, § 28 and M.C.L. 24.285 is unsubstantiated." (188a-189a, emphasis added).

The Court of Appeals in *In re Application of Indiana Michigan Power Co., supra*, expressly declined to address Petitioner's preemption argument:

> "Appellants argue that federal law does not preempt the PSC's ratemaking powers over SNF fees. **We need not consider this**

> **argument because the PSC did not rely on the doctrine of federal preemption.** Moreover, a state utility commission must allow, as a reasonable operating expense, a cost incurred pursuant to a federal statute, *ABATE v. Public Service Comm.*, 192 Mich. App. 19, 22-27; 480 N.W.2d 585 (1981), and, SNF fees paid by IMPCo are mandated by statute, 42 U.S.C. §10222(a)(2)." (192a, n. 5, emphasis added).[7]

Therefore, the Court of Appeals did not reach any preemption issue in this case (or in *In re Application of Indiana Michigan Power Co.*), and did not implicate any of the federal preemption cases cited by Petitioner. As noted above, the Court of Appeals did not find the MPSC's ratemaking authority constrained by federal law. Instead, the Court of Appeals properly applied the Michigan Court Rules (relevantly quoted above) and Michigan's statutory standard of review under M.C.L. 462.26, which requires the appealing party to show by clear and satisfactory evidence that the MPSC order is unlawful or unreasonable.

Petitioner's disregard for Michigan law and what the Michigan Court of Appeals actually decided – and did not decide – underscores the lack of foundation for the federal preemption issue that Petitioner attempts

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[7] The Court's observation in Footnote 5 (192a) is also *dicta* because it addressed a question not necessary to the Court's decision. *See, Murray v. Menzies Real Homes Co.*, 236 Mich. 77; 210 N.W. 217 (1926).

to raise before this Court. Petitioner's assertion that the Court of Appeals improperly applied collateral estoppel (Petition, p. 3) lacks merit under Michigan law, which provides that the Court of Appeals' published opinion in *In re Application of Indiana Michigan Power Co.* was binding precedent here. M.C.R. 7.215(C)(2) and M.C.R. 7.215(J)(1). (176a-177a).[8] Both cases involved this very same Petitioner's challenge, through the same witness, to SNF fee recovery in an electric utility's PSCR plan case. Indiana Michigan Power Company (I&M or IMPCo) and Edison each operate a nuclear power plant. The record in *In re Application of Indiana Michigan Power Co.*, like the record concerning Edison here, reflected that (1) the utility's payment of SNF fees notwithstanding the federal government's delay in completing a SNF disposal site was consistent with the actions of other utilities, (2) if the utility refused to pay the fees, then it risked losing its license to operate its nuclear plant, and (3) the utility supported litigation to compel the federal government to fulfill its duties to accept SNF for disposal. Accordingly, the Court of Appeals affirmed the MPSC's conclusion in both cases that the utility acted reasonably and prudently, and the MPSC's rejection of Petitioner's unfounded remedies.

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[8] Although collateral estoppel does not apply in the pure sense to certain MPSC decisions, it is well established under Michigan law that such decisions do not have to be relitigated. *Pennwalt Corp. v. Public Service Comm.*, 166 Mich. App. 1, 9; 420 N.W.2d 156 (1988).

The MPSC and Court of Appeals' succinct rejections of Petitioner's arguments simply reflect that the Commission and the Court have repeatedly heard, and repeatedly rejected, those arguments. Petitioner's arguments, although lengthy, do not raise any meritorious point. The Commission and Court's decisions are soundly based on Michigan law (which allows Edison's recovery of costs that it reasonably and prudently incurs) and the record (which demonstrates that Edison acted reasonably and prudently).

Even apart from *In re Application of Indiana Michigan Power Co., supra*, the controlling law and record demonstrate that the Commission and Michigan Court of Appeals properly rejected Petitioner's arguments. Edison pays Nuclear Waste Fund fees to the DOE pursuant to 42 U.S.C. §10222(a)(2). (64a). The DOE has been delayed in building a SNF repository. Based on Petitioner's speculation about the DOE's future conduct, Petitioner challenged Edison's ability to continue to recover the SNF fees in its rates, and further advocated the imposition of new financial and reporting requirements on Edison for the disposal of SNF. The Commission has repeatedly rejected Petitioner's arguments in past cases, and Petitioner's continuing dispute of previously-established matters did not provide any basis for the Commission to change its position. *See, Michigan Environmental Council v. Public Service Comm., unpublished opinion per curiam of the Court of Appeals, decided May 11, 2004* (Docket Nos. 244354 and 246744), *lv. den.*, 471 Mich. 870 (2004) (Appendix U

in Supreme Court Docket No. 08-246, 365a, affirming the MPSC in MPSC Case No. U-12275, and explaining: "No statute authorizes the PSC to take action such as that suggested by MEC and PIRGIM in either a general rate case or a PSCR proceeding absent a finding of unreasonable or imprudent action by a utility").

Petitioner's arguments are based on the premise that Edison does not have to pay SNF fees, even though 42 U.S.C. §10222(a)(2) provides that Edison must pay a 1.0 mill per kilowatt hour (kWh) fee on net electricity generated and sold by its Fermi 2 nuclear plant (64a), as Petitioner's own witness acknowledged on this record (257a-258a). The Nuclear Waste Policy Act of 1982 (NWPA) directs the DOE to dispose of SNF. 42 U.S.C. §10131(a)(4) ("Federal government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of . . . ") (60a).[9] The NWPA assigned to the DOE the

[9] The NWPA represents a "comprehensive scheme" for the disposal of SNF and establishes specific duties and responsibilities for the federal government, the States and the civilian nuclear power industry. *General Electric v. Dep't of Energy*, 764 F.2d 896, 898 (DC Cir. 1985). Under the NWPA, the federal government has the express responsibility for the long-term storage and permanent disposal of SNF and high-level nuclear waste (42 U.S.C. §10143), the process of siting storage and disposal facilities for nuclear waste (42 U.S.C. §10121-10175) and the Nuclear Waste Fund to pay for these activities. 42 U.S.C. §10222.

(Continued on following page)

responsibility for building and placing into operation a permanent geologic repository for commercially-generated SNF. The record further demonstrates that there is no merit in Petitioner's proposal that the Commission should hold Edison responsible in the event the DOE does not construct the contemplated

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The NWPA requires civilian nuclear power generators to contract to pay the U.S. Treasury 1 mill/kWh on net electricity generated and sold from nuclear generating plants. As conditions for federal acceptance of SNF and the avoidance of any further financial obligation for long-term storage and disposal, nuclear power generators must pay the 1 mill/kWh SNF disposal surcharge and execute the DOE contract. 42 U.S.C. §10222(a)(2). (64a). The NWPA further directs the Nuclear Regulatory Commission to require that its nuclear power licensees enter into the DOE contract. The law also directs the DOE not to accept SNF unless the fuel owner is under contract with DOE. 42 U.S.C. §10222(b). (67a).

Accordingly, Edison maintains a contract with the DOE and pays SNF fees. Nuclear utilities must hold a Standard Contract as a condition of maintaining their operating licenses. 42 U.S.C. §§10222(a) and (b). *See also, Roedler v. Dep't of Energy*, 255 F.3d 1347, 1350 (Fed. Cir. 2001) (the utility "has paid and apparently continues to pay the [Nuclear Waste] fee, as a condition of the continuing operation of its nuclear-fueled electricity generating facilities.").

The NWPA states "For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee [to offset the costs of disposal of high level radioactive waste and spent nuclear fuel] shall be equal to 1.0 mill per kilowatt-hour." 42 U.S.C. §10222(a)(2). (64a). The Standard Contract is the mechanism for collecting this fee, but the NWPA indicates that the fee must be paid even in the absence of such a contract. *See*, 42 U.S.C. §10222(a)(3) (stating that the fee was retroactive prior to the initiation of the Standard Contracts). (65a).

facility, or in Petitioner's proposal to place SNF fees in escrow (Tr 2498). It is beyond credible dispute that Edison has appropriately maintained its position for the permanent disposal of SNF (instead of risking being "last in line" for disposal), while maintaining its Fermi 2 license to provide electricity to its customers (instead of risking the shut-down of that plant). (Tr 2634).

The record before the MPSC further reflects that Petitioner's suggestion that the DOE might never perform its duties under the Standard Contract is mere speculation (Tr 2502), and that there is no sound basis to believe that the federal government will "permanently fail" to accept SNF for disposal, particularly in light of the federal government's recommendation of the Yucca Mountain Site in 2002, and the importance of SNF disposal to national security (Tr 2634-35). The NRC found in 1990 and reconfirmed in 1999 that there is reasonable assurance that an SNF repository will be developed and operational during the first quarter of this century (Tr 2636-38).

The MPSC and Court of Appeals correctly applied Michigan law in light of a full and clear evidentiary record. None of these decisions required a finding that the MPSC's ratemaking authority is preempted by federal law. There is no merit in Petitioner's contentions that the decisions are contrary to decisions of this Court, the federal Court of Appeals and lower federal courts, since those contentions are based on Petitioner's misstatements concerning the

decisions and the record below. No further review would be appropriate to decide an academic and undeveloped question that would not alter the outcome of this case because, in any event (even assuming that Petitioner is correct that the MPSC is not preempted by federal law from taking action under Michigan law), there is still no basis for the MPSC to take any action against Edison under Michigan law (setting forth a reasonable and prudent standard for cost recovery) and the evidentiary record (which demonstrates that Edison was reasonable and prudent). Similarly, Petitioner's contention that the nonissue presented has significant national importance likewise affords no basis for this Court to grant the Petition. This is a state-law case that was driven by its facts, so this case would not be an appropriate vehicle to attempt to address a federal preemption issue with regard to SNF fee payments.

II. THE RECORD SUPPORTS THE COMMISSION'S DECISION THAT EDISON REASONABLY AND PRUDENTLY PAID THE SNF FEE, SO EDISON COULD CONTINUE TO RECOVER THAT COST IN ITS RATES UNDER MICHIGAN LAW.

As discussed above, there is no sound basis for this Court to review the preemption question that Petitioner presents. There is no need for further analysis, and the Petition should simply be denied. For the sake of completeness, however, and due to Petitioner's gross mischaracterizations of this case

and the Commission, Edison presents further detail explaining that Petitioner's arguments boil down to a disagreement with facts that have been repeatedly established on the evidentiary records in Commission proceedings. Accordingly, the Commission properly allowed Edison to continue to recover its SNF fees from its retail electric customers through retail electric rates, and the Court of Appeals properly affirmed.

Petitioner mischaracterizes Edison's evidentiary presentation, and suggests that Edison should have offered more proof (*e.g.*, Petition, p. 15). To the contrary, the record fully demonstrates, and it is beyond credible dispute, that Edison was reasonable and prudent in paying the SNF fee, instead of risking the loss of its Fermi 2 license. Past proceedings at the Commission had also established Edison's reasonable and prudent actions over the years regarding its SNF costs.

Petitioner ignores that it injected the SNF issues into this case before the MPSC, and that Edison appropriately responded to them. Petitioner failed to carry its burden to (1) allege *specific* unreasonable and imprudent conduct, and (2) establish that claim before the Commission. A utility's expenses must be presumed reasonable and prudent, absent a clear showing of bad faith or abuse of discretion. *Public Utilities Comm. v. Michigan State Tel. Co.*, 228 Mich. 658; 200 N.W. 749 (1924). To attack a utility's expenses, "waste or negligence . . . must be established by evidence." *West Ohio Gas Co. v. Public Utilities*

Comm. of Ohio, 294 U.S. 63, 68; 55 S. Ct. 316; 79 L. Ed. 761, 767 (1934). Further, "good faith is to be presumed on the part of the managers of a [utility]." 294 U.S. at 72; 79 L. Ed. at 769.[10]

There is no merit in Petitioner's suggestion that the Commission failed to carry out its duties, and Petitioner's citation of *Detroit v. Public Service Comm.*, 308 Mich. 706; 14 N.W.2d 784 (1944) to support that assertion is misplaced (Petition, p. 25). In *Michigan Environmental Council, supra*, (Appendix U in Supreme Court Docket No. 08-246), the Michigan Court of Appeals held that the Commission "acted in accordance with the authority granted to it" (Docket No. 08-246, 366a, citing *Detroit, supra*). *See also, Union Carbide Corp. v. Public Service Comm.*,

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[10] This Court has long honored the principle that utility costs are presumed to be reasonable and prudent. In *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm. of Missouri*, 262 U.S. 276, 288-289; 43 S. Ct. 544; 67 L. Ed. 981, 985 (1922), the Court explained:

> "[W]hile the state may regulate, with a view to enforcing reasonable rates and charges, . . . 'it is not empowered to substitute its judgment for that of the [utility]; *nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the [utility].*'" (Emphasis added).

The Michigan Supreme Court reiterated this same principle in *Union Carbide Corp. v. Public Service Comm.*, 431 Mich. 135, 148; 428 N.W.2d 322 (1988). *Also see Ohio Power Co. v. FERC*, 880 F.2d 1400, 1413 (DC Cir. 1989) (Mikva, J., concurring) ("[I]t has been long-settled that a utility's costs are presumed [subject to rebuttal] to be prudently incurred.")

431 Mich. 135, 148; 428 N.W.2d 322 (1988) (discussing the Commission's statutory authority and rejecting an overbroad reading of *Detroit, supra*). Thus, there is absolutely no basis for Petitioner to criticize the Commission for an alleged lack of action. Instead, there is a lack of merit and relevance in Petitioner's arguments.[11]

The record before the MPSC demonstrates that Petitioner failed to prove that Edison's response has been materially different than the responses of numerous other utilities, and Petitioner presented no credible criticism of the way Edison has managed its SNF costs (Tr 2631). Petitioner failed to carry its burden of pleading and proof, just as it has repeatedly failed in the past. As the Commission was well aware, SNF disposal is a national issue, which is far bigger than Edison and beyond Edison's control. *See generally,* 42 U.S.C. §10131(a)(2). (60a). Thus, the Commission appropriately found that "Detroit Edison has provided sufficient basis upon which to find that it has reasonably and prudently incurred its SNF costs, and MEC/PIRGIM has not successfully demonstrated otherwise" (24a).

On this record before the MPSC, Edison witness Colonnello further testified that Edison has been

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[11] Petitioner largely ignores the record, and mischaracterizes the decisions below, in favor of a 37-page Petition that consists largely of hyperbole, and which cobbles together and reprints various arguments, many of which do not have any connection to this case.

reasonable and prudent with respect to actions and associated costs for storing SNF at the Fermi 2 plant. Edison has also taken actions to protect its rights under the Standard Contract with the DOE, and to protect itself and its customers regarding the DOE's delays (Tr 2631).

In 1994, Edison anticipated the loss of storage capability in the spent fuel pool, and evaluated options for expanding the capacity to store SNF onsite. Edison's current SNF storage strategy provides balance between establishing timely capacity and preserving capital expenditures. Edison's approach is consistent with industry experience, and reasonable and prudent for minimizing the costs of storing SNF onsite (Tr 2631-32).

Edison has also taken ongoing actions for almost a decade to protect itself and its customers regarding the DOE's delays. In September, 1995, Edison and other utilities sued the DOE, arguing that the DOE had a legal responsibility to begin taking SNF by the 1998 Contract date. In January 1997, Edison and 35 other nuclear utilities filed suit to attempt to force the federal government to meet its legal obligation to begin accepting SNF. In December 2002, Edison sued the DOE for damages under the contract associated with the DOE's failure to begin accepting SNF (Tr 2632-33). Edison has also worked over the past 10 years to solicit public and congressional support for legislative efforts to advance the acceptance of SNF. These efforts have successfully contributed to the present progress towards construction of a SNF

repository at Yucca Mountain. These actions by Edison were appropriately responsive, very reasonable, and consistent with the actions of most other U.S. nuclear utilities (Tr 2633-34).[12]

Edison was also involved in key SNF litigation, including *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272 (DC Cir. 1996) and *Northern States Power Co. v. Dep't of Energy*, 128 F.3d 754 (DC Cir. 1997), where the public service commissions of many states and many utility companies joined forces to seek relief from the DOE's progress in dealing with

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[12] Similarly, in MPSC Case No. U-12121 (referenced at 260a), where Petitioner was a party, Edison witness Dr. Hsieh explained, through cross examination elicited by Petitioner, that Edison has joined in filing several legal actions attempting to assist and/or require the DOE to discharge its duties with respect to SNF (U-12121, Tr 42); Edison participated in a private SNF storage initiative (*Id.* at 44-45) and Edison continues to actively monitor related industry events (*Id.*, at 45, 49, 67). The Commission was also well aware that Edison joined it as a founding member of the Nuclear Waste Strategy Coalition in 1993. The primary purpose of that organization is to lobby Congress and the DOE to move forward with the nuclear waste disposal program. In connection with this coalition, there have been communications and exchanges of information regarding SNF between Edison and the MPSC. Through the Coalition, representatives from Edison met frequently with MPSC Staff and Commission members to discuss and share information related to SNF issues. These meetings and exchanges of information are reflected in the annual reports of the Coalition, which have been provided to the MPSC. The Commission was entitled to use its "experience, technical competence and specialized knowledge in the evaluation of evidence presented to it" in this case. M.C.L. 24.277. (167a).

SNF disposal. Edison, either directly or through a utility group, cooperated and exchanged SNF information with members of the Commission and other interested parties. There were also several strategic meetings among Edison, other utilities, and the Commission to discuss litigation strategy in those cases.[13]

Edison has, from the beginning, initiated and supported appropriate efforts regarding its SNF costs. These efforts have more than satisfied any objective "reasonable and prudent" standard for cost recovery under Michigan law. Under these circumstances, there is no credible basis on which to further question the reasonableness and prudence of Edison's SNF costs.

III. PETITIONER'S PROPOSED REMEDIES WOULD BE INAPPROPRIATE.

Again, the Court need not reach the following discussion, since Petitioner presents only a preemption question that is not appropriate for review by this Court. There is also no basis to reach Petitioner's proposed "remedies," since Edison did not do anything

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[13] Petitioner did not participate in those cases; however, its present attorney, in his former role as Assistant Attorney General in charge of the Public Service Division for the State of Michigan, participated in meetings of the Nuclear Waste Strategy Coalition, and personally argued *Indiana Michigan Power Co., supra*, and *Northern States Power Co., supra*, on behalf of a large number of the affected parties.

unreasonable or imprudent in the first place. Due to Petitioner's gross mischaracterizations and for the sake of completeness, however, Edison submits that in addition to the Commission and Michigan Court of Appeals being absolutely right, Petitioner's contrary proposals are wrong.

Although Edison shares the frustration of many others regarding the DOE's slow progress in developing a facility for the disposal of SNF, Edison has acted reasonably and prudently under the circumstances. Accordingly, based on Michigan law and the evidentiary record, the Commission appropriately allowed Edison to recover the SNF fee costs from its customers, as explained above. The Commission also appropriately rejected the additional utility financial reporting and other remedies advocated by Petitioner. Such remedies would not accelerate developing a safe, cost-effective and timely federal facility for disposing of SNF. Rather, they would simply penalize Edison for the DOE's delay, without any lawful or reasonable basis for such a penalty. The Commission appropriately found, as it did in Case No. U-12613, *supra*, and as recommended by the ALJ, that MEC/PIGRIM's "proposals are not necessary to correct any showing of an unreasonable or imprudent action or omission on the part of [utility] management . . . and the commission is unable to find that

[the utility] has been imprudent." (U-12613 Order, pp. 8-9, more fully quoted at 43a).[14]

In addition to being unfounded, Petitioner's proposals are also irresponsible and counterproductive. If the DOE repudiates its obligations entirely (which has *not* happened and is completely speculative), then the appropriate protection for electric customers likely would be for Edison to seek relief from the DOE, including refund of all amounts previously paid to the DOE under the Standard Contract, in addition to other potentially-available relief against the DOE. The advisability of such a course of action, its likelihood of success, and the ultimate disposition of any recovery, are of course subject to future facts, law and circumstances, which are unknown and unknowable at this time.[15]

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[14] Petitioner's proposals are also unnecessary because the funds paid to the DOE by Michigan utilities are already protected by the federal government. 42 U.S.C. §10222(c). (68a). The NWPA provides that all fees paid to the DOE by utilities are deposited in the Nuclear Waste Fund. The NWPA may be used only for radioactive waste disposal expenses. 42 U.S.C. §10222(d). (69a). *Alabama Power Co. v. Dep't of Energy*, 307 F.3d 1300, 1312-16 (11th Cir. 2002).

[15] Edison declines to further comment on ongoing litigation, but notes that there is authority supporting the proposition that seeking contract damages (rather than Petitioner's suggestions) should be a utility's first response to the DOE's default on its obligation to take possession of SNF. *Northern States Power v. Dep't of Energy*, 224 F.3d 1361 (Fed. Cir. 2000); *Maine Yankee Atomic Power v. United States*, 225 F.3d 1336 (Fed. Cir. 2000).

(Continued on following page)

The situation is unchanged by Petitioner's accusations that Edison should take drastic action based on speculation that the DOE's delay in establishing a permanent repository at Yucca Mountain is somehow an indication that such a repository will never open. It is undisputed that the opening of such a repository has been delayed, but there is also no credible dispute that Edison's actions are appropriate in light of the situation, and the MPSC properly declined Petitioner's proposals to take action against Edison, since Edison did not do anything wrong in the first place.

Finally, the record demonstrates that the MPSC was correct in finding no merit in Petitioner's witness Callen's recommendation that the Commission establish annual filing and reporting requirements for Edison regarding SNF (Tr 2503). Edison witness

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The United States Court of Appeals for the Federal Circuit also recently explained:

> "Here, Indiana Michigan could not have claimed anticipatory repudiation even if it wanted to; while the government did indicate that it would not meet the 1998 deadline, its actions did not portend an absolute refusal to perform the contract. The NWPA itself, and the Standard Contract's terms drafted pursuant to it, compelled Indiana Michigan to bring an action for partial, not total breach. Had Indiana Michigan brought an action for total breach, DOE would have been discharged from further responsibility under the contract, a situation apparently not desired by appellant and foreclosed by statute." *Indiana Michigan Power Co. v. United States*, 422 F.3d 1369, 1374 (Fed. Cir. 2005).

Colonnello explained that the nuclear utility industry is one of the most highly monitored and regulated industries in the country. The Commission already receives reports every 3 years on Edison's nuclear decommissioning fund, which includes SNF information. Additional information is available to the Commission and its professional Staff on request. Petitioner's proposed filing and reporting requirements would increase costs, without any benefit (Tr 2641).

Thus, in addition to the lack of foundation for the MPSC to disallow Edison's cost recovery under Michigan law and the evidentiary record, Petitioner's proposed remedies lack merit. Consequently, the MPSC and the Michigan Court of Appeals correctly rejected Petitioner's claims on the basis of Michigan law.

CONCLUSION

The Petition is unfounded, and there is no sound basis to grant it. Therefore, Respondent Edison respectfully requests that the Petition be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

MICHIGAN ENVIRONMENTAL COUNCIL,
Petitioner,

v.

MICHIGAN PUBLIC SERVICE COMMISSION and
THE DETROIT EDISON COMPANY,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

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ARGUMENT IN REPLY

I. This case involves a federal question as to whether the ratemaking powers of the state MPSC are preempted by federal law, and does not involve a fact-bound case under state law as argued by Respondent.

Respondent Detroit Edison Company ("DECo") erroneously asserts that this case[1] does not involve a federal preemption question, but rather, state law issues concerning whether the Michigan Public Service Commission ("MPSC") and lower Court lawfully determined, based upon the evidentiary record, that Respondent DECo was reasonable and prudent in continuing to pay fees under its breached Standard Contract, justifying unexamined recognition of the contract fees in retail rates regulated under Michigan law, and justifying rejection of other ratemaking remedies presented by Petitioner under all of the MPSC's comprehensive ratemaking authority.

Petitioner presented a preemption issue in another recent certiorari petition filed in this Court, which this Court recently denied.[2] Notably, however, this case

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[1] Petitioner's certiorari petition seeking review of July 3, 2007 Michigan Court of Appeals decision *In re application of Detroit Edison Company*, 276 Mich. App. 216, 740 N.W.2d 685 (2007), Appendix 1a-16a.

[2] Supreme Court Docket No. 08-246.

involves some differences from the *IM Power* case.[3] Admittedly, in both this case and *IM Power*, the utility argued in hearings and briefing before the presiding Administrative Law Judge ("ALJ") and the MPSC that the MPSC's ratemaking authority to review or address the cost of fees paid by the utilities under their Standard Contract (77a-118) for spent nuclear fuel ("SNF") disposal was preempted by federal law. However, in this case, unlike *IM Power*, the ALJ unquestionably ruled that MPSC ratemaking authority was preempted. The MPSC orders in this case then adopted this ALJ ruling.[4] This contrasts with the *IM Power* case where the lower Court claimed it need not rule upon the preemption issue because the MPSC did not do so (180a-195a, specifically 192a).

Secondly, the lower Court in this case simply affirmed the MPSC decision, thereby also erroneously upholding the preemption result, but without any reasoning or explanation, despite the extensive briefs filed by both Petitioner and Respondent before the lower Court with respect to the preemption issue. The Court in this case did so by simply adopting its *IM Power* case decision through the erroneous application of collateral estoppel, on an unforeseen sua sponte basis, without any input from the parties below. The lower Court did so despite binding published Michigan precedent that holds that collateral estoppel does not apply to cases arising from utility ratemaking.

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[3] The Michigan Court of Appeals is cited as *In re Application of Indiana Michigan Power Company*, 275 Mich. App. 369, 738 N.W.2d 289 (2007), Petitioner's Appendix 180a-195a.

[4] MPSC June 30, 2005 Order Denying Rehearing (17a-26a); MPSC November 23, 2004 Opinion and Order, (relevant portions), 27a-37a.

Consumers Energy v. MPSC, 707 N.W.2d 633 (2005). The Court in this case also failed to explain how collateral estoppel could apply here when, under its own finding in *IM Power*, the two cases are dissimilar on a key point (i.e. the Court in *IM Power* found that it need not rule on the preemption issue because the MPSC did not rule on the preemption issue, whereas in this (the DECo case), the opposite is true – the ALJ ruled that preemption applied and the MPSC orders adopted the ALJ's ruling).

Respondent DECo's brief attempts to claim that the case here was decided upon an evidentiary basis under state law, wholly aside from the preemption issue. The inescapable problem with this argument is that the MPSC orders made no specific findings upon any of the extensive evidence presented by Petitioner (or Respondent) before the agency.[5] And, of course, as noted, the lower Court also wholly avoided any review or discussion of any specific agency evidentiary findings (1a-16a, specifically 15a-16a).

Respondent DECo's arguments referencing its own witness' evidentiary discussion that DECo has been "reasonable and prudent" in continuing to pay SNF contract fees under a contract suffering from a long-term breach, and without any hint of conditions or protections of the contract fees being paid, based upon vague and unexplained concerns about such things as the risk of loss of its nuclear plant license, represents nothing more than DECo's counsel's post hoc briefing

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[5] The MPSC's sparse, conclusionary, non-evidentiary findings are found in the MPSC's order, dated November 23, 2004, (27a-37a) and order denying rehearing, dated June 30, 2005 (17a-26a).

arguments – these arguments do not represent evidentiary findings made by the agency, based upon the record evidence (in accordance with the duty assigned the agency under Michigan law[6]).

Respondent DECo's arguments that the MPSC simply found that DECo was reasonable and prudent based upon record evidence and the standards of state law are erroneous – the MPSC assigned by law to evaluate the evidence and make findings based thereon simply did not make such findings. The scantness of the MPSC's end-result driven disposition of the SNF fee cost and rate issues demonstrates instead that the basis for its *fait accompli* ruling and result was the MPSC's perception that its ratemaking powers with respect to said costs are preempted by federal law, and that the MPSC under our federal system is thereby powerless to protect ratepayers by invoking any of the range of ratemaking remedies presented in evidence by Petitioner.[7]

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[6] Art 6, Section 28 of the Michigan Constitution (175a) requires that Court review of MPSC decisions "shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law and in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record"; see also, Michigan Administrative Procedures Act, including Section 85, MCL 24.285 (172a).

[7] Record evidence of Petitioner expert witness (243a-295a), including "collect but protect remedies" (289a-295a), including rate investigation, SNF site decommissioning trust; SNF cost rates collected under a utility performance bond, insurance, among related remedies (all fully recognized by the Nuclear Regulatory Commission as additional financial assurances that state regulatory authorities may adopt).

Respondent DECo's other argument – essentially that DECo's reasonableness and prudence may be premised upon the Court's affirmance of the MPSC orders in the *IM Power* case is also unmeritorious. The reviewing Court under Michigan law is not empowered to make *de novo* factual findings. *Associated Truck Lines v. Public Service Commission*, 377 Mich. 259; 140 N.W.2d 515 (1966). The Court in this case must base its review upon the MPSC's evidentiary findings in this case, and the legal issues and findings made by the agency, and not upon the record in the *IM Power* case[8] Respondent DECo also avoids the legal reality that the scope of the MPSC's remedial ratemaking powers was also more extensive in this case compared to the *IM Power* case.[9]

Respondent DECo's argument (Brief in Opposition, pp 22-23) that a state law basis for the MPSC and lower Court result (and not preemption) may be found (assumed) based upon a theory that utility management actions must be presumed to be reasonable and prudent absent an "abuse of discretion" is simply not applicable under Michigan law. Unlike the "file and use" tariffs and ratemaking procedures used six or more decades ago, when the old cases cited by Respondent were decided, utilities under Michigan law since 1952 have been assigned the burden of proof

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[8] In *IM Power*, a portion of Petitioner's expert evidence was improperly stricken, whereas in this DECo case, all of Petitioner's expert evidence was admitted in the evidentiary record.

[9] In this case (DECo), the Commission's ratemaking powers were based upon all of the Commission's ratemaking statutes governing both base rates and Act 304 fuel-type costs, and the scope of ratemaking remedies were thus broader.

to file an application seeking the establishment of new rates, along with evidence to establish that its incurred costs result from reasonable and prudent action.[10] The MPSC, in turn, has the duty to make findings of fact and law based upon the "competent, material, and substantial evidence on the record as a whole",[11] which definitionally refers to not only the evidence presented by the utility but also that of intervenor ratepayer representatives like Petitioner here.

In this case, the utility failed to prove that it was reasonable and prudent in continuing to pay, indefinitely, and without protective conditions or protections, SNF fees under a contract that is in long-term breach. The MPSC then wholly dodged making any of the required findings of fact and law based upon the evidence on the record as a whole – including the evidence presented by respondent utility and of Petitioner (including Petitioner's various recommended ratemaking remedies designed to protect ratepayers with respect to the ongoing SNF fee costs).

Respondent DECo also appears to rely on the lower *IM Power* court decision as a basis to make up for the lack of findings of the agency below based upon the record in this case. This attempted transference is without merit for reasons in addition to that discussed above. Unlike *IM Power*, (which was only an Act 304

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[10] Section 6a, MCL 460.6a, (since 1952) 120a-123a; Section 6j *et seq.*, MCL 460.6j *et seq.*; (since 1982) 123a-136a.

[11] See FN 6, *supra*.

case) this case commenced as a consolidated base rate and Act 304 case, conducted pursuant to all of the comprehensive ratemaking powers of the MPSC. This case was also the subject of MPSC orders, Court appeals, and Court briefing and arguments, completed months before the *IM Power* case (although the lower Court held this case up to issue its *IM Power* decision first). This DECo case was the lead case that involved the SNF fee cost and rate issues (and remedies) and concerning the preemption issue as well. Respondent DECo erroneously attempts to ignore these realities, and to "bootstrap" the lower Court's *IM Power* decision as the basis supporting the MPSC's decision here (despite the broader evidentiary record and more comprehensive agency jurisdictional power applicable to this case).

Respondent DECo (Brief in Opposition, p 10) claims that "it is undisputed that a federal statute assesses the SNF fee", and then characterizes Petitioner's position as advocating that "Edison should stop paying the SNF fee" (DECo brief, pp 4, 9, 10, 18) or "that Edison could not recover SNF fee costs that it paid" (p 11). However, Respondent DECo fails to acknowledge Petitioner's consistent position throughout that the NWPA[12] did not address, let alone curtail or preempt, state ratemaking authority over DECo's cost of service when setting rates, and that the SNF fee established in 42 U.S.C. § 10222 did not control how that fee cost should be treated in DECo's rates given the long-term breach in the SNF disposal contract to which the fee was irrevocably linked. DECo's payment of the SNF

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[12] Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* (52a-76a).

fee was reciprocal to DOE's SNF disposal duties, as affirmatively declared by the U.S. Court of Appeals in *Indiana Michigan Power v. DOE*, 88 F.3d 1272 (1996) and *Northern States Power v. DOE*, 128 F.3d 754 (1997). Given this context, Petitioners asserted that, while DECo could continue to pay the fees, DECo was not reasonable and prudent in continuing to pay the fees indefinitely, without protections or conditions, in the face of DOE's ongoing breach of the reciprocal disposal duties under the contract. The current context of this issue is no different than if DECo continued to pay annually under a coal contract (and without protective conditions such as an escrow or lawsuit for restitution or specific performance, etc.) in a situation where the coal company never delivered any coal. Petitioners argued that the MPSC should act under its ratemaking powers to protect ratepayers regarding the ongoing SNF fees, by a range of alternative remedies (such as a rate disallowance, placement of SNF fee collections from ratepayers into an escrow trust, a more thorough rate investigation of the issue, etc.) in this situation. Respondent DECo's response to Petitioner throughout has been, predominantly, that the MPSC cannot act to protect ratepayers because the MPSC ratemaking powers are preempted with respect to the federally "mandated" SNF fee. DECo's erroneous legal position on this issue prevailed below, and was the driving basis for the ALJ, MPSC, and lower Court rulings below.

Respondent DECo's claim that the result in this case (and the agency's decision) below was not based upon federal preemption is also belied by the extensive arguments that Respondent DECo made before the ALJ, the agency, and the lower Courts, that MPSC ratemaking authority over the SNF fee cost and rate

issues was preempted by federal law. Respondent DECo, and other Michigan utilities, have repeatedly made these arguments in cases before the agency. Respondents' simplistic arguments have involved the theory that the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10101 *et seq.* (52a-76a) assesses and mandates the fee, apparently indefinitely, and without relevance to the contract performance required under the NWPA and Standard Contract (payment of fee in exchange for commencement of SNF disposal in 1998) and despite the long-term (and likely permanent) breach of performance under the Contract, and despite the federal Court of Appeals' holding that the payment of the fees was (and is) a reciprocal obligation to contract performance. *Indiana Michigan Power Co. v. DOE*, 88 F.3d 1272 (1996).

The reality is that the preemption issue is the "800 pound" gorilla that drives the end-result of the MPSC's rulings refusing to consider ratemaking remedies to protect ratepayers with respect to the ongoing SNF fee costs incurred by utilities (despite the ongoing failure of performance under the contract). Respondent DECo is in error in suggesting that the result in this case would be the same without resolution of the preemption issue. The reality is that if the MPSC and lower Court were informed by this Court that federal preemption does not control the result, then proper review of the SNF fee cost issues and ratemaking remedies could then be undertaken.

II. The MPSC and lower Court decisions below do not comport with decisions of this Court and the United States Court of Appeals.

This Court held in *Pacific Gas & Electric v. Energy Resources Commission*, 461 U.S. 190 (1983), that neither the Atomic Energy Act, 42 U.S.C. § 2011 nor the NWPA preempted a state agency's jurisdiction to regulate a retail nuclear utility with respect to the economic or environmental costs of nuclear energy.

In 1999, another federal court directly and extensively reviewed the NWPA and the Standard Contract, and found no language or intent by Congress to address (i.e. preempt) state ratemaking authority over a retail nuclear utility.[13]

The U.S. Court of Appeals in *Indiana Michigan Power Company v. DOE*, 88 F.3d 1272 (1996) held that the payment of fees under the Standard Contract and DOE's commencement of SNF disposal by January 31, 1998, involved a reciprocal obligation, and a *quid pro quo* of the contractual bargain inherent in the NWPA and Standard Contract. The Court's holding in *Indiana Michigan* was reaffirmed in the U.S. Court of Appeals decision in *Northern States Power v. DOE*, 128 F.3d 754 (1997).

The decisions of the ALJ, MPSC, and lower Court below adopting the utility's claim that MPSC ratemaking authority to review and adopt ratemaking

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[13] *Roedler et al. v. Dept of Energy, et al*, 1999 U.S. Dist Lexis 21613, unpublished, 205a-242a, affirmed, *Roedler et al. v. DOE et al.*, 255 F.3d 1347 (2001).

remedies with respect to the SNF contract fees is preempted by federal law ignores and eviscerates the federal Court holdings above. The rulings below also ignore the reality that nothing in the NWPA, court decisions, Standard Contract, or any other cited authority, establishes any intent to intrude into (let alone preempt) state ratemaking authority over retail utilities. By so doing, the decisions below effectively foreclose meaningful ratemaking review of the SNF fee cost issues on behalf of the retail ratepayers that the MPSC was established to protect. The decisions below also remove important incentives for utilities to invoke all appropriate remedies to protect the ongoing contract fee payments and to seek performance under the contract, or to otherwise enforce the contract.

CONCLUSION

Petitioner requests this Honorable Court to grant the petition and review this case.

Respectfully submitted,

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